IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1636

DAVID UNGAR, et al.
and
JOHN RADER, et al.,

Petitioners,

v

DUNKIN' DONUTS OF AMERICA, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this action on March 3, 1976.

OPINIONS AND ORDERS BELOW.

The opinion of the District Court dated March 12, 1975 when it granted class certification to certain issues is reported at 68 F. R. D. 65 (E. D. Pa. 1975); 1975-1 Trade Cases ¶ 60,204 (E. D. Pa. 1975) and appears in Appendix A. The opinion of the District Court dated April 8, 1975 certifying its class action opinion for inter-

locutory appeal, pursuant to 28 U. S. C. § 1292(b), is reported at 1975-1 Trade Cases ¶ 60,361 (E. D. Pa. 1975); it appears in Appendix B. The order of the Court of Appeals dated May 7, 1975 accepting the interlocutory appeal, pursuant to 28 U. S. C. § 1292(b), is not reported; it appears in Appendix C. The opinion of the Court of Appeals dated March 3, 1976 reversing, in part, the class certification of the District Court is reported at 1976-1 Trade Cases ¶ 60,763 (3d Cir. 1976); it appears in Appendix D. The order of the Court of Appeals dated April 5, 1976 denying appellees' (petitioners) petition for rehearing in banc is not reported; it appears in Appendix E. The order of the Court of Appeals dated April 14, 1976 staying the mandate, pursuant to Rule 41(b) of F. R. A. P., is not reported; it appears in Appendix F.

JURISDICTION.

The final judgment of the Court of Appeals was entered on March 3, 1976. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Is not the private enforcement of the antitrust laws effectively threatened by the Court of Appeals holding that, in order to establish per se illegal tying arrangement under Section 1 of the Sherman Act, 15 U. S. C. § 1, a plaintiff must not only prove the tie-in requirements as defined by this Court in *Northern Pacific Railway v. United States,* 356 U. S. 1 (1956), to wit that:

> (1) defendant had a resolutely enforced company-wide policy to grant its franchise "*but only on the condition* that the buyer also purchases a different product" from defendant and its designated supplier, and
>
> (2) the franchisor "has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product" and
>
> (3) "a 'not insubstantial' amount of interstate commerce is affected",

but, *in addition,* must also affirmatively prove a separate and distinct element termed "individual coercion"? [1]

STATUTE AND RULE INVOLVED.

The applicable statute is Section 1 of the Sherman Act, 15 U. S. C. § 1. It provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ."

Rule 23 of the Federal Rules of Civil Procedure is the applicable rule, 28 U. S. C. Rule 23. It provides in pertinent part:

> "(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the

1. While this case comes before the Court in the context of a decision on the certification of a class, both the District Court and the Court of Appeals recognized that the controlling issue was one of the substantive law of tie-ins. If there is no requirement that a plaintiff allege and prove this separate element called "individual coercion", it is clear that the District Court's certification of the tie-in class was correct and should have been affirmed by the Court of Appeals.

class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

STATEMENT OF THE CASE.

Plaintiffs (petitioners herein) instituted separate (now consolidated) actions in 1972 charging defendants (respondents herein) with, *inter alia,* violation of Section 1 of the Sherman Act, specifically that respondents had a policy of granting the license to use its trademark only on the condition that each licensee also agree to lease real estate and purchase equipment and signs solely from the defendants and purchase all supplies solely from defendants' authorized suppliers (A5). Prior to November 1970, this company policy was expressly set forth in respondents' standard form contract documents. Effective the beginning of the fiscal year immediately following the decision in *Chicken Delight Inc. v. Harris,* 412 F. 2d 830 (9th Cir. 1969), the tying language was removed from the standard form documents (A6), but the respondents' policy on the tie-in did not change.

Petitioners brought the actions individually and on behalf of all other current and former franchisees of the respondents. In their motion for class action determination pursuant to Federal Rule of Civil Procedure 23(c)(4), plaintiffs sought class certification for the following claims: the equipment tie-in, the sign tie-in, the real estate tie-in, the supplier tie-in, advertising, real estate tax escrow, restrictive covenant and common law fraud claims.

The District Court decided that before it could decide the class action petition, it had to first determine whether the petitioners, in order to establish an illegal tie-in, must prove a separate and distinct element called "individual coercion". If there were such a requirement, individual issues would predominate and a class action would be inappropriate. If there were no such requirement, class action certification would be appropriate.

The District Court noted that the plaintiffs conceded that they must prove that the defendants *used the requisite economic power to condition* the sale of one product on the purchase of a second and distinct product [2] (A8, 45). Plaintiffs contended, however, that there was no additional requirement that they prove a separate and distinct element termed by the defendants "individual coercion" (A8-9). Defendants, on the other hand, contended that "individual coercion" was a separate and distinct element

2. The Circuit Court of Appeals stated plaintiffs' contention as follows: ". . . that Dunkin' Donuts had a policy of granting a license to use its trademark *only on the condition* that the licensee accept certain other items from Dunkin' Donuts, . . ." (A185). (emphasis added)

of a tie-in which must be affirmatively proved by the plaintiffs (A8, 47).

The District Court first attempted to arrive at a definition of the term "individual coercion". It realized the semantic overtones of the problem and observed that "It is possible that by means of an linquistic phenomena alone, 'coercion' may have assumed an independent viability in the law" (A49). The District Court noted that "coercion" was a "chameleon hued word" and had been used differently in different cases, sometimes merely to connote the use of economic power or influence and "sometimes in the strict sense posited by the defendant" (A80). As a basis for its analysis, the District Court accepted defendants' definition of what it meant by "individual coercion". After discussing various definitions of coercion, the District Court noted:

> "Dunkin' Donuts opts for a construction in the harshest light to plaintiff i.e. to bar each plaintiff from a cause of action unless each can show that he bargained to reject each specific tied product and capitulated by taking each tied product due to improper economic pressure." (A74).[3]

It was this definition of "individual coercion" that the District Court, after careful analysis, was to reject as the *sole* method of establishing an illegal tie-in, and it was this definition of "individual coercion" that the Court

3. In its brief to the Court of Appeals, the defendants attempted to retreat from this untenable position by saying that "conditioning might be a better generic term" and can be "substituted for the words 'coerce' or 'coercion'." (Def. Brief p. 18). This is not mere semantics, it is a 180° turn about by defendants. The District Court in no way rejected a requirement of "conditioning" or "use of economic power" (A45). Rather, what the Court rejected was defendants' untenable contention that franchisee-by-franchisee proof of "individual coercion" as defined by the defendants, was a separate and distinct element of an illegal tie-in which each plaintiff must affirmatively prove.

of Appeals held must be affirmatively proven by a plaintiff in order to establish an illegal tie-in.

In analyzing the issue, the District Court recognized and accepted the requirement of a tie-in *condition*. The District Court noted that: ". . . a tie-in cannot exist unless the availability of the tying product *is conditioned* on the purchase of the tied product." (A45)[4] (emphasis added). Likewise, it recognized that the requisite economic power must not merely exist, it must be used in support of the condition (A8). The issue to be decided, the District Court noted, was whether the plaintiffs also had the obligation of going further and proving "individual coercion" as defined by the defendants, i.e. of proving that each franchisee "after negotiating on the point, was coerced" into acting against his will and accepting the tie-in (A47).

The District Court noted that illegal tie-ins deprive a buyer of the free choice to select a product on its merits. However, the District Court recognized that this Court's "principal concern seems to be the foreclosure of competition in the tied product." (A25). Thus, the Court stated that its analysis could not be limited to a focus upon whether the individual plaintiffs have been injured but must be heavily concentrated "on the economic injury brought upon competitors in the tied product and hence upon the market place and the economy as a whole." (A27). See also Turner, *The Validity of Tying Arrangements Under the Anti-Trust Laws,* 72 Harv. 50, 60-61 (1958).

The District Court noted that this Court has not set forth a coercion requirement in tying cases and that "the

4. The District Court also noted: "To succeed in a claim of unlawful tying, the plaintiff must prove that the tying product was unavailable without the tied product. What is at issue here is the question of proof." (A45, fn. 31).

law comprehends tying suits by foreclosed competitors in which a question of coercion of franchisees seems peripheral at best." (A46). The District Court sagely observed that the dispute may well resolve into a dispute, not over the requisites of a tie, but over the appropriate means of proving use of economic power (A49).

After an exhaustive study and analysis of the law, the District Court determined that:

> "[P]roof of individual coercion is but *one of several* means of establishing the use of economic power or leverage.
>
> ° ° °
>
> We thus resolved the use-coercion dialogue by rejecting the doctrine that 'individual coercion' must be proved in order to establish an unlawful tie." (A80-82) (emphasis added).

The District Court then went on to make the following corollary determinations:

> 1. Use of economic power can be established by evidence of a firm and resolutely enforced policy to condition the sale of the franchise upon the agreement by the franchisee to purchase or lease equipment, real estate, supplies and signs from the defendants (A81).
>
> 2. Use of economic power is inferrable from the acceptance by a large number of buyers of a burdensome or uneconomic tie. At least such evidence would be probative on the issue (A81-82).
>
> 3. A tie-in condition appearing in the express terms of a written contract can show the use of economic power (A79).

> 4. Individual coercion, as defined by the defendants, can also be used to show use of economic power (A79-80).

The District Court noted that it has not presented "a formulation with the precision of a jury charge. Nor have we attempted to posit the quantum of evidence required before the case can go to the jury." (A82-83). What the District Court did was to review the elements that the plaintiffs must establish in order to prove an per se illegal tie-in and from that determine whether they could be proved on a class basis. On the basis of its rejection of defendants' position as to "individual coercion", the District Court certified a tie-in class, *inter alia*, with respect to equipment, signs, real estate and supplies.[5]

The Court of Appeals reversed the District Court and ruled that, in addition to the elements of a tie-in accepted by the District Court, the plaintiffs must also affirmatively prove a separate and distinct element called "individual coercion" in order to establish an per se illegal tie-in.[6] The Court of Appeals found that this Court in its tie-in opinions has set forth a coercion requirement. In reaching this determination, the Court of Appeals referred to certain language in opinions of this Court respecting "leverage", "force", etc. (A192-193). Nowhere does the Court of Appeals refer to any language of any opinion which states

5. The District Court also certified a class with respect to the contractual claims concerning the advertising fund and the antitrust claims concerning the in-term restrictive covenant (A150).

6. The Court of Appeals stated that "coercion" is the relevant term in the context of substantive law and that "individual coercion" is the relevant term in the context of a class action (A193). However, the Court of Appeals nowhere defined "coercion". Since it reversed the District Court on the point, it must be assumed that it was using the same definition as was used by the District Court, i.e. defendants' definition of "individual coercion" (See *supra* p. 6).

that "leverage", "force", etc., are separate and distinct elements which must affirmatively be proven. Moreover, the Court of Appeals apparently did not realize that the leverage or force referred to in opinions of this Court is always referred to as a *by-product* or *result* of the *use* of *economic power to condition* the sale on one product on the purchase of another product. Indeed, all this Court indicated was that a restraint of trade results from an illegal tie-in. This is the exact reason why tie-ins have fared so badly before this Court.

After determining that a plaintiff must prove a separate and independent element termed "coercion" the Court of Appeals went on to determine that this element must be established on an individual basis, i.e. each franchisee must prove it tried to negotiate out of the tie-in but failed. It ruled that proof of acceptance of a burdensome or uneconomic tie-in by a large number of franchisees could not alone establish *prima facie* proof of "the coercive element of an illegal tie-in claim." The Court of Appeals apparently was moved by a concern about the effect of class actions on franchisors (A199).

Finally, the Court of Appeals refused to face up to the question concerning the effect of a "coercion" requirement on a suit by a competitor of the "tier". The Court noted, in footnote 7(a) (A197) that "We express no opinion as to what kind of proof ought to be required of a plaintiff's supplier alleging injury to his business from the tie-in." Thus, the Court of Appeals has obliquely hinted that there may be two separate types of tie-ins with "coercion" an affirmative element of one of the actions but perhaps not of the other. Needless to say, it cited no authority for this proposition.

REASONS FOR GRANTING THE WRIT.

A. The Decision of the Court of Appeals Is Contrary to the Applicable Decisions of This Court Which Have Never Set Out Coercion as a Separate and Independent Element of an Illegal Tie-in and Which in Fact, Preclude Such an Element.

The Court of Appeals based its decision, in part, on its own interpretation of language in tie-in opinions of this Court which contained words such as "force", "leverage", etc. What the Court of Appeals ignored, however, is that these words were never stated by this Court to be *separate elements* of an illegal tie-in; they were always used to describe the *effect* or *by-products* of an illegal tie-in. Thus, the Court of Appeals took a description of the *effect* of *some* illegal tie-ins and placed upon plaintiffs the burden of affirmatively proving this as a separate and distinct *element* of a tie-in in all cases.[7]

It is significant that there is not a single opinion of this Court which states that, in order to establish an illegal tie-in, a plaintiff must prove a separate and distinct element called "coercion". It would have been simple enough to include this element in the definition of or listing of the elements of a tie-in. The fact that it has never been done by this Court is indeed significant. A review of the significant tying decisions of this Court amply demonstrates that the Court of Appeals decision was incorrect.

In *United Shoe Manufacturing Corp. v. United States*, 258 U. S. 451 (1922), this Court held that United Shoe's practice of requiring lessees of its patented shoe manufacturing equipment to purchase other machinery and inci-

7. It is not without significance that when listing the elements of a tie-in that a plaintiff must prove, the Court of Appeals did not include "coercion" (A203). Since all of these elements can be proven on a class basis (see *infra* p. 26), the decision of the Court of Appeals becomes inherently inconsistent.

dental supplies only from United Shoe violated Section 3 of the Clayton Act.[8] There was no evidence of any "coercion", merely the discussion of the tie-in condition.[9] Significantly, the Court noted that an illegal tie-in occurs even though the condition is "not enforced" (Id. at 458).

The next significant tie-in case was *International Salt Co. v. United States,* 332 U. S. 392 (1947). Once again the Court noted that an illegal tie-in could exist even though the tie-in condition was not always enforced (Id. at 398) and once again there was no evidence of any "coercion"; there was merely the condition on the lessee to use the salt products of the lessor of the machine.

It is significant that in arguing for certain terms in the decree, the government successfully sought to prevent International Salt from effectuating the tie-in by a "more favorable treatment of a customer who buys its salt." (Id. at 403). Thus, not only was there no individual coercion as defined by the defendants herein, but the case makes it quite clear that a tie-in can be effectuated, not solely by coercion, but also by a "more favorable treatment of a customer" to induce it to buy both products. Accord. *Fortner Enterprises, Inc. v. United States Steel,* 394 U. S. 495 (1969).

The next tie-in case in this Court was *Times-Picayune Publishing Company, et al. v. United States,* 345 U. S. 594 (1953) where this Court stated, *inter alia,* that: "*By conditioning* his sale of one commodity on the purchase of another, *a seller coerces* the abdication of buyer's independent judgment as to the 'tied' product's merits. . . ." Id. at 605. Clearly, the "conditioning" is the essential *element* while the loss of the buyer's "independent judgment", is the *result*—"By *conditioning* . . . a seller coerces

8. Section 3 of the Clayton Act has the same elements as Section 1 of the Sherman Act for the present purposes.

9. Petitioners and the District Court always recognized the requirement of proving the "tie-in" condition (See *supra* pp. 7 & 9).

. . ." If indeed coercion is a necessary part of a tie-in, it is necessarily present when the other elements, all of which can be proved on a class basis, are present and there is no "coercive" requirement beyond proof of the tie-in "condition".

In this case the District Court always recognized that plaintiffs must prove that defendants *conditioned* the sale of one product on the purchase of a second product. Indeed, the Court found that this condition appeared in defendants' standard contract documents until November, 1970 and that thereafter there was still a "resolutely enforced" company-wide policy to condition the grant of its franchise on the agreement by the franchisee to purchase other products from the defendant.[10]

In the leading case of *Northern Pacific Railway Co. v. United States,* 356 U. S. 1 (1958), this Court defined a tying arrangement as —"an *agreement* by a party to sell one product but on the *condition* that the buyer also purchases a different (or tied) product or at least *agrees* that he will not purchase that product from any other suppliers." (Id. at 5-6) (emphasis added). Again, it can be seen that coercion is nowhere mentioned in the definition and is, thus, not one of the essential separate elements of a tie-in. If "coercion" were a necessary separate element of a tie-in, it would have clearly appeared in the definition.

These "tie-in agreements" are per se violations whenever a party has the requisite economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial amount of interstate commerce is effected." (Id.

10. For example, the defendants purchased the complete equipment package from only one source, Paramount Fountain & Restaurant Supply Company, and in turn had the equipment package shipped directly to the franchisees at an increased cost of $7,000 to $22,000 to the franchisees (A12, 101-102).

at 6). This Court then went on to explain that the reason for the control or dominance requirement is that it leaves the buyer with no reasonable means of obtaining the tying product without accepting the condition of the seller, i.e. the purchase of the tied product (Id. at 6-7). Thus, it is the use of this economic power which results in the condition becoming a restraint on trade (Id. at 6-7). This is exactly what the District Court held in this case. The Court of Appeals, however, ignored this aspect, but instead added an additional element of individual coercion.

It is significant that there is no mention of any evidence of "coercion" in the *Northern Pacific* case; there is a discussion of the tie-in condition. The defendant in the *Northern Pacific* case contended that the "preferential routing" clauses were not always enforced and that in any event, they allowed the lessee to ship by a competing carrier if its rates were lower or its service better than the defendant, i.e. the buyer loses nothing. In rejecting this contention, this Court noted:

> "Of course if these restrictive provisions are merely harmless seives with no tendancy to restrain competition, as the defendant's argument seems to imply, it is hard to understand why it has expended so much effort in obtaining them in vast numbers and upholding their validity, or how they are of any benefit to anyone, even the defendant. But, however may be, the essential fact remains that these agreements are binding obligations held over the heads of vendees *which deny defendant's competitors access to the fenced off market on the same terms as the defendant.*" (Id. at 11) (emphasis added).

Thus, the Court notes that even though the condition is not onerous or coercive to the customer, it does restrain competition by denying defendant's competitors access

"to the fenced off market on the same terms as the defendant". Under the rule of the Court of Appeals, a supplier would not have a cause of action where there is no actual overcoming of the will of each buyer by improper pressure from the seller, even though there is in fact a restraint of trade. While the Appellate Court indicates somewhat obliquely that perhaps coercion may not be necessary in a suit by a competitor, there is no support anywhere for the proposition that elements of the tie-in are different depending on whether or not the suit is by a customer or by a competitor. See *Fortner v. United States Steel, infra.*

The case of *United States v. Loew's, Inc.*, 371 U. S. 38 (1962) continued the trend of easing the requirement of the amount of economic power necessary to constitute a per se illegal tie-in agreement. The Court held that the ". . . crucial economic power may be inferred from the tying products' desirability to consumers or from the uniqueness in its attributes. The requisite economic power is presumed when the tying product is patented or copyrighted. . . ." (Id. at 45). Thus, again the Court notes that not coercion but "desirability" or "uniqueness" of the tying product may constitute an important part of a tie-in.[11]

In none of these cases is there any requirement that the purchaser must affirmatively attempt to negotiate out of the tie-in. No where is there any indication that there must be an investigation to determine whether the buyer is less than willing to enter into the tie-in; indeed this Court speaks of a tie-in as an "agreement".

11. The "uniqueness" in the present case is, of course, supplied by defendants' trademark and license agreement. See *Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.*, 463 F. 2d 1002 (5th Cir. 1972), cert. denied, 409 U. S. 1086; *Siegel, supra; Aamco v. Tayloe*, 1976 Trade Cases ¶ 60,666 (E. D. Pa. 1976); *Hawkins v. Holiday Inns, Inc.*, 1975 Trade Cases ¶ 60,153 (W. D. Tenn. 1975).

The District Court in *Loew's* looked into the circumstances concerning the various negotiations, but, as the Supreme Court noted: "Since defendant C. & C. was found to have had an overall policy of block booking, the Court did not analyze the particular circumstances of the negotiations which had resulted in the licensing the packages of films." (Id. at 43). In the instant case the District Court found that the plaintiffs had established *prima facie* evidence that the defendants had an overall company policy to condition the grant of a franchise upon the agreement by the customer to purchase or lease equipment, signs, real estate and supplies from the defendants or it authorized suppliers. Indeed the Court of Appeals in this case noted that: "[A]ppellees emphasized that the focus of their case was not individual instances of illegal conduct, but a pervasive company policy, 'firm and resolutely enforced', to tie the real estate, equipment, signs and supplies to the trademark license." (A187). An individual inquiry into the circumstances of each particular negotiation is thus not necessary and a class certification is appropriate.

The most recent Supreme Court decision involving illegal tie-ins is *Fortner Enterprises, Inc. v. United States Steel Corporation,* 394 U. S. 495 (1969). The plaintiff charged that a per se violation of the Sherman Act occurred because of tying arrangements whereby loans by the subsidiary of the defendant to the plaintiff, for the purchase and development of land, were conditioned upon plaintiff's agreeing to erect prefabricated houses manufactured by the parent on each of the lots purchased with the loan proceeds.

As to the question of the amount of commerce effected, the Court stated: ". . . normally the controlling consideration is simply whether a total amount of business, substantial enough in dollar-volume so as not to be merely *de minimus,* is foreclosed to competitors by the tie, . . ." (Id. at 501). Thus this Court had foremost in mind the *effect the agreement had on competitors of the defendant.*

The Court recognized the lessening of the requirement of economic power and gave the reason for that as follows:

> "These decisions rejecting the need for proof of truly dominant power over the trying product have all been based on a recognition that because tying arrangements generally serve no legitimate purpose that cannot be achieved in some less restrictive way, the *presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie.* Such appreciable restraint results whenever the seller can exert some power over some of the buyers in the market, even if his power is not complete over them and over all other buyers in the market." 349 U. S. at 503 (emphasis added).

The Court noted therefore that the "proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable amount of buyers within the market". (Id. at 504). The Court went on to note that the competitors of United States Steel sold prefabricated houses and built conventional homes for at least $400 less than United States Steel price for comparable models. The Court noted:

> "Since in a freely competitive situation, buyers would not accept a tying arrangement obligating them to buy a tied product at a price higher than the going market rate, this substantial price differential with respect to the tied product (prefabricated houses)

in itself may suggest that respondents had some special economic power [i.e. coercion] in the credit market." 349 U. S. at 504 (emphasis added).

In the present case, the plaintiffs produced evidence that virtually 100% of the Dunkin' Donuts' franchisees purchased the equipment from Dunkin' Donuts' designated supplier even though the price of the equipment cost $7,000 to $20,000 more than they could have bought it directly from defendants' only supplier or another equipment supplier (A102). This indeed suggests that this was not "a freely competitive situation" and that there was "some special economic power" on the part of Dunkin' Donuts. As the District Court determined, there was *prima facie* evidence of ". . . an inherently coercive marketing system. . . ." (A68).

This Court in *Fortner* noted that the ability to give unusually advantageous terms can also reflect a creditor's unique economic advantage over its competitors. Thus, these unusually favorable terms for the tying product, hardly coercive, can induce an illegal tie-in. Perhaps the most significant language for our purpose is in the dissent by Mr. Justice White. Mr. Justice White states: "[E]ven if the customer is *indifferent* among brands of the second product and *therefore loses nothing by agreeing* to use the seller's brand of the second in order to get his brand of the first, such tying agreements may work significant restraints on competition in the tied product." 349 U. S. at 512-513 (emphasis added). Thus, even though the seller has no real interest in whether he gets the tied product of the seller and thus, could not possibly be "coerced", the mere condition is sufficient to create a tying situation, *because of the impact upon the seller's competitors.*

Thus, it can be seen from a review of the cases that:

1. In *no case* was it held that a plaintiff must prove a separate element called "*coercion*".[12]

2. Factually, there was no evidence in any case of the separate element called "*coercion*"; there was merely the presence of tie-in "*condition*" and the use of "*economic power*".

3. A prime concern in a tying situation is that competition in the tied product is restrained.

4. Because tying arrangements generally serve no legitimate business purpose that cannot be achieved in some less restrictive way, the presence of *any* appreciable restraint on competition provides a sufficient reason for invalidating the tie.

5. The fact that a customer would pay more for a tied product is, *in itself*, evidence that there was not a "freely competitive situation" and that the seller had special economic power concerning the tying product.

Moreover, there is no sound antitrust policy for any requirement that a plaintiff be required to affirmatively prove a separate and distinct element called "coercion".

1. To require such proof would virtually eliminate the right of a competitor of the tie-in seller from bringing suit to enjoin the tie-in or recover damages for a "consensual" tie-in between the competing seller and that seller's customers.

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12. Indeed, Mr. Justice White, in a concurring opinion, in *Perma Life Mufflers, Inc. v. International Parts Co.*, 392 U. S. 134, 145 (1968), stated:

"When those with market power and leverage persuade, coerce, *or* influence others to cooperate in an illegal combination to their damage, allowing recovery to the latter is wholly consistent with the purpose of § 4, since it will deter those most likely to be responsible for organizing forbidden schemes." (Emphasis added)

2. The elements commonly said to constitute a per se illegal tie-in are economically sound and sufficient. These elements—conditioning, use of economic power and impact on interstate commerce—are broad enough to subsume "coercion" no matter how defined or subtly wielded.

3. The word "coercion" has no gloss insofar as tie-in law is concerned. Depending on how it is defined, it may necessarily be present whenever an inequality of bargaining power is present. Moreover, whatever "coercion" may be necessary, if any, is automatically and necessarily present when the standard elements are present.

4. Use of the "coercion" concept changes the focus of tie-ins from their effect on the market place to the state of mind of the purchaser. It completely negates the primary concern involving tie-ins—the effect on competitors of the seller.

5. The only real purpose that "coercion" has as defined by defendants, is that in intent and in fact it eliminates all class action tie-ins suits and puts one of the most widespread abuse of franchisors beyond effective redress.

6. A requirement that a plaintiff must affirmatively prove a separate and distinct element of "coercion", as defined by defendants, introduces a vague and unsettling element in tie-in actions. Is a plaintiff "coerced" when he is free not to take the second product but he thinks he must take it? Is a plaintiff "coerced" when he thinks he is free to take the second product but, in fact, has no such freedom? Additional uncertain situations are endless. Moreover, the proof required would be difficult and time consuming, especially when the "coercion" is subtle.

Thus, the decision of the Court of Appeals is contrary to the decisions of this Court, is unsound antitrust policy and threatens the effective private enforcement of the antitrust laws by both customers and competitors of the tie-in seller.

B. The Decision of the Court of Appeals Is Contrary to the Applicable Decisions of This Court Which Have Held That the Acceptance of a Burdensome Tying Arrangement in Itself Is Evidence of Sufficient Economic Power to Impose a Tie-in.

This Court has reminded us that it deals with economic realities and not mere words. It is not surprising then that this Court puts more credence in facts then it does labels. In *Times-Picayune Publishing Co., et al. v. United States, supra* at 605, this Court stated:

> "Yet 'tying agreements serve hardly any purpose beyond the suppression of competition.' *Standard Oil Co. v. United States,* 337 U. S. 293 (1949) . . . Thus '[I]n the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract [tie-in] and only his control of the supply of the tying device, whether conferred to patent monopoly or otherwise obtained, could *induce* a buyer to enter one' " (emphasis added).

Thus, this Court's common sense approach notes that the mere fact that the buyer accepts the tie-in is evidence of the seller's power to impose [i.e. coerce] the tie-in arrangement.

In *Fortner Enterprises, supra* at 504, this Court noted that when dealing with the question of the existence of market control the "proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable amount of buyers within the market." The Court then aptly noted:

> "Since in a freely competitive situation, buyers would not accept a tying arrangement obligating them to buy a tied product at a price higher than the going

market rate, this substantial price differential with respect to the tied product (prefabricated houses) *in itself* may suggest that respondents had some special economic power in the credit market." 349 U. S. at 504 (emphasis added).

In the present case, the plaintiffs produced evidence that, even though it costs from $7,000 to $22,000 more to do so, *405 out of 406* franchisees prior to November 1970 purchased the equipment package from Dunkin' Donuts and after 1970, *all* franchisees purchased the equipment package from Dunkin' Donuts (A102). This indeed is compelling evidence that this was not a "freely competitive situation" but that the defendants had "some special economic power" to "induce" this result. In Turner, *The Validity of Tying Arrangements Under the Anti-Trust Laws,* 72 Harv. L. R. 50, 62 (1958), the author [13] states:

> "If in a described category of cases the tie-in serves no useful function, or if any useful functions can be fulfilled in a large majority of instances by less restrictive devices, it is a reasonable assumption that the *purpose* of the seller in using a tie-in is to restrain competition in the tied product and that he has the *power* over the tying product which his purpose implies he has." (emphasis added).

The decision of the Court of Appeals that the acceptance of the burdensome tie by a substantial number of purchasers can never establish a *prima facie* case is thus contrary to the clear language of opinions of this Court and flies in the face of common sense.

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13. From 1965-1968 the author, Professor Donald F. Turner of Harvard Law School, was the Assistant Attorney General in charge of the Antitrust Division of the U. S. Department of Justice.

C. The Effect of the Appellate Court's Decision Is a Complete Emasculation of the Purpose Behind Rule 23 and Represents a Clear Prohibition for Franchisees to Bring Class Action Antitrust Suits Against Their Franchisors Thus Inhibiting Private Enforcement of the Antitrust Laws.

While the Court of Appeals recognized the imbalance of power between a franchisor and its franchisees ("The franchise system in this country today is not free from problems. Most, if not all, of these arise from the disparity in power and sophistication between franchisor and franchisee.") (A200), it completely failed to recognize the purpose and the effect this decision will have on class action antitrust litigation in the franchising industry. In effect, this decision will act as a "death knell" for all franchise tie-in class actions where the complained of practices are not written in the franchise documents. The Court of Appeals has, in effect, held that a franchisor who after *Siegel v. Chicken Delight, Inc.,* 271 F. Supp. 722 (N. D. Cal. 1967), modified *sub nom., Chicken Delight, Inc. v. Harris,* 412 F. 2d 830 (9th Cir. 1969), has eliminated all of the anticompetitive tie-in language from the franchise documents, will not be subject to class action certification, even though the franchisor still retains the tie-in policy. This represents not only a complete emasculation of Rule 23 of F. R. Civ. P., but more importantly, it insulates any franchisor who practices illegal tie-ins which are not set forth in the franchise agreements from antitrust class actions. The decision by the Court of Appeals will act as an effective deterrent to private enforcement of the antitrust laws. This is completely contrary to this Court's prior decisions.

The general necessity for class action treatment of related claims is emphatically demonstrated when the

underlying cause of action seeks redress for violations of the antitrust laws, since vigorous private enforcement of the antitrust laws has repeatedly been recognized as providing a necessary supplement to suits brought by the United States. In *Perma Life Mufflers, Inc. v. International Parts Co.*, 392 U. S. 134, 139 (1968), for example, the Court characterized private suits as "a bulwark of antitrust enforcement" and refused to recognize a defense of *in pari delicto* as a bar to such a suit, since "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to anyone contemplating business behavior in violation of the antitrust laws." [14]

Recently in *Alyeska Pipeline Service Co. v. Wilderness Society*, – U. S. –, 95 S. Ct. 1612, 1624 (1975), the Court reiterated its long standing policy behind private enforcement of the antitrust laws when it commented:

> ". . . Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation. Fee-shifting in connection with treble damage awards under the antitrust laws is a prime example. . . ."

In *Hawaii v. Standard Oil Company of California*, 405 U. S. 251, 262, 266 (1972), the Court reaffirmed the encouragement of private plaintiffs enforcing the antitrust laws as "'private attorneys general.'" 405 U. S. at 262. The Court further recognized the important role which Rule 23 plays in private enforcement:

14. See also *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U. S. 311, 381-19 (1965); *Radovich v. National Football League*, 352 U. S. 445, 453-54 (1957); *Emich Motors Corp. v. General Motors Corp.*, 340 U. S. 558, 567-68 (1951); *Bruce's Juices, Inc. v. American Can Co.*, 330 U. S. 743, 751-52 (1947). *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U. S. 481 (1968); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U. S. 321, 336 (1971).

> ". . . Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture." 405 U. S. at 266.

See also *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U. S. 211 (1950).

Furthermore, in *Mills v. Electric Auto-Lite Company* 396 U. S. 385, 396 (1970), a class action case which involved, *inter alia*, a violation of § 14(a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78(a), the Court recognized the importance of securities class actions which have equal force when applied to antitrust class actions: ". . . private stockholders [consumers] actions of this sort [class actions] involve corporate therapeutics' and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy [antitrust] statute." See also the Court's recent opinion in *Goldfarb v. Virginia State Bar*, – U. S. –, 95 S. Ct. 2004 (1975), where the Court indicated that an antitrust price-fixing class action was appropriate. Because of this significant function performed by treble damage plaintiffs in enforcing federal regulatory policies by class action, ". . . the interests of justice require that in a doubtful case . . . an error, if there be one, should be committed in favor of allowing the class action." *Kahen v. Rosenstiel*, 424 F. 2d 161, 169 (3d Cir. 1970); *cert. den., sub nom. Glen Alden Corp. v. Kahan*, 398 U. S. 950 (1970); *Esplin v. Hirschi*, 402 F. 2d 94, 101 (10th Cir. 1968), *cert. den.* 394 U. S. 928 (1968).

In light of this Court's pronouncements that private enforcement of the antitrust laws is paramount in maintaining competition, it is inconsistent at best that the Court of Appeals focused its concern that competition in the marketplace was not the key issue, but: ". . . the danger

posed is not to antitrust plaintiffs, it is to antitrust defendants." (A199). The thrust of the Court of Appeals' decision is clearly contrary to the underlying foundation of the Sherman Act.

Moreover, the Advisory Committee on the F. R. Civ. P. recognized that Rule 23 was particularly applicable in antitrust tying situations:

> ". . . a patentee of a machine charged with selling or licensing the machine on *condition* that purchasers or licensees also purchase or obtain licensees to use an ancillary unpatented machine could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test, the legality of the 'tying' condition." (emphasis added). Notes of Advisory Committee on Rules, 28 *U. S. C. A. Federal Rules of Civil Procedure, Rules 17 to 23.2*, p. 299.

The practical effect of the Court of Appeals' decision is that it does threaten private enforcement of the antitrust laws because of the imbalance of power between the franchisee and the franchisor. Few are the franchisees who are willing or able to do battle against ". . . the great corporation that is his supplier, his banker and his landlord." *F. T. C. v. Texaco, Inc.*, 343 U. S. 223, 227 (1968). The equalizing effect that is given to the franchisees in a class action is apparent: it enables the franchisees who have common predominating issues of fact or law to present a united, concerted and effective front against those anticompetitive practices that have been excluded by the franchisor from the franchise agreements since *Siegel, supra*.

As this Court noted in *Perma Life, supra* at 136: "Because these rulings by the Court of Appeals *seemed* to threaten the effectiveness of the private action as a vital

means for enforcing the antitrust policy of the United States we granted certiorari." (emphasis added). The argument is equally applicable in the case *sub judice*.

With this decision, every franchisor in the country who has removed the anticompetitive practices from the contracts, but who still has a firm resolute anticompetitive policy to condition tying arrangements is now insulated from a tie-in class action litigation. This is completely contrary to the purpose and effect of Rule 23 and the Sherman Antitrust Act. Judge Decker, in the well known case *of State of Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484, 493-94 (N. D. Ill. 1969), recognized the importance of the class action device in implementing the Congressional policy behind the antitrust laws:

> "Upholding the national class action will facilitate private antitrust litigation and will discourage future conspiracy violations."

Mr. Justice Douglas in the important antitrust class action decision of *Eisen v. Carlisle & Jacquelin*, 417 U. S. 156, (1974), in which he concurred in part and dissented in part, along with Mr. Justice Brennan and Mr. Justice Marshall, quoted from an article by Judge Weinstein of the Eastern District of New York which appeared in the *New York Law Journal* of May 2, 1972 where Judge Weinstein aptly concluded:

> "'Where, however, public authorities are remiss in performance of this responsibility for reason of inadequate legal authority, excessive workloads or simple indifference, class actions may provide a necessary temporary measure until desirable corrections have occurred. The existence of class action litigation may also play a substantial role in bringing about more efficient administrative enforcement and in inducing legislative action.

'The matter touches on the issue of the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all our citizens—including those deprived of human rights, consumers who overpay for products because of antitrust violations and investors who are victimized by insider trading or misleading information—or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce while unwilling to grant a civil remedy against the corporation which has benefited, to the extent of many millions of dollars, from collusive, illegal pricing of its goods to the public.

'When the organization of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy—or at least to deter—that conduct.'" 417 U. S. at 186.

Clearly, to allow what the Court in *Northern Pacific, supra* at 5, has stated is one of the "pernicious" practices to go unfettered, is in direct conflict with the dictates of Rule 23, prior Supreme Court decisions and the general policy behind antitrust enforcement.

D. The Decision by the Court Below Raises Significant Economic Issues Which Transcend the Entire Franchise Industry Warranting Review by This Court.

The importance of the Court of Appeal's decision goes far beyond the mere resolution of the class action issue. This landmark franchising decision will have an effect on sales made by franchisors to franchisees which totalled over $3.6 Billion in 1973 (excluding sales made by franchisors to automobile and truck dealers, gasoline service stations and soft drink bottlers).[15] The class decisions in the instant case, both at the Court of Appeals and District Court level, have been the subject of great publicity both in the business and legal communities. This much publicized case has had and will continue to have substantial and far reaching impact in an area of the antitrust law which is vital to the franchising industry. Its importance is underscored by the fact that the issue of coercion, whether it be in a contract or not in a contract, has been and will continue to be raised numerous cases, with confusing and conflicting results.[16] See *Siegel, supra; Hawkins v. Holiday Inns, Inc.*, 1975 Trade Cases ¶ 60,153 (W. D. Tenn. 1975); *Herrman v. Atlantic Richfield Co.*, 65 F. R. D. 585 (W. D. Pa. 1974); *Sommers v. Abraham Lincoln Federal Savings and Loan Assoc.*, 1975 Trade Cases ¶ 60,280 (E. D. Pa. 1975); *Aamco Automatic Transmissions v. Tayloe*, 1976 Trade Cases ¶ 60,666 (E. D. Pa. 1976) and *Fall Church Bratwursthaus v. Bratwursthaus Management Corp.*, 354 F. Supp. 1237 (E. D. Va. 1973) and *In Re Clark Oil and Refining Corp.*, 1974-1 Trade Cases ¶ 74,880 (E. D. Wis. 1974) compared to *Bogosian v. Gulf Oil Corp., et al.*, 62 F. R. D. 124 (E. D. Pa. 1973), on appeal; *Plekowski v. Ralston Purina Co.*, 1975-2 Trade Cases ¶ 60,411 (M. D. Ga. 1975); *DiCostanzo v. Chrysler Corp.*, 57 F. R. D. 495 (E. D. Pa. 1972); *Abercrombie v. Lums, Inc.*, 345 F. Supp. 387 (S. D. Fla. 1972) and *Smith v. Denny's Restaurants, Inc.*, 62 F. R. D. 459 (N. D. Cal. 1974).

Not only will an early and definitive ruling by this Court lay to rest and prevent the spawning of new litiga-

15. U. S. Department of Commerce, Franchising In The Economy 1973-75, at 24 (G. P. O. 1975).

16. Of course, the decision of the Court of Appeals is not limited to the franchise industry, it affects all tie-in cases in the business community.

tion involving this important area of the antitrust law, but by issuing the Writ of Certiorari, guidance to the franchise business community will be given so that the franchisee and his franchisor will be able to deal with each other under an atmosphere of understanding with respect to tie-ins. Petitioners submit that it is imperative that this Court review the decision of the Court below in view of the importance to the general economy of clear and correct guidelines for the proper standard to be applied in the important area of illegal tie-ins.

CONCLUSION.

In considering whether to issue the Writ of Certiorari, it is important to keep in mind the purpose for which the Sherman Act was brought into being. This Court in *United States v. Topco Associates,* 405 U. S. 596, 610 (1972) recognized that the antitrust laws are a fundamental statement of American economic policy when it stated:

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Charta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster."

If the Court of Appeals is correct in requiring affirmative proof of "coercion" as a separate element of a tying violation, then the use of Rule 23 as a deterrent to an antitrust offender in a tying situation is for all practical purposes ended. If violations so well established by testimony and documents as evidenced by the District Court's findings (A96-119) cannot form the basis for the maintenance of a class action, then the antitrust laws themselves have become the exclusive province of the executive branch or the private litigant whose financial interests are so substantial that litigation is an available tool for winning relief. Unless the federal judiciary remains available to the franchisees or the consumers on a class basis to enforce the antitrust laws, there is precious little to deter future violators from tampering with the competitive market.

For all the foregoing reasons, petitioners respectfully submit that this petition should be granted and a Writ of Certiorari should issue to the Court of Appeals for the Third Circuit.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1636

DAVID UNGAR, et al. and JOHN RADER, et al.,
Petitioners,

v.

DUNKIN' DONUTS OF AMERICA, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

SUPPLEMENTAL MEMORANDUM FOR PETITIONERS

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SUPPLEMENTAL MEMORANDUM FOR PETITIONERS

Petitioners respectfully call the Court's attention to a recent decision of the Court of Appeals for the Fifth Circuit which demonstrates a further conflict among the Circuit Courts of Appeals concerning the issues

on which petitioners seek certiorari. In Carpa, Inc. v. Ward Foods, Inc., 1976 - 2 Trade Cases ¶60,995 (5th Cir. July 28, 1976), the Circuit Court of Appeals:

1. Recognized that "coercion" is not a separate element of a §1 tie-in violation (Accord Hill v. A-T-O, Inc., et al., 1976 1 Trade Cases ¶60,873 (2d Cir. May 10, 1976); and

2. Relying on Fortner Enterprises, Inc. v. United States Steel, 394 U.S. 495 (1969), held that the acceptance of a burdensome tie-in by an appreciable number of purchasers "alone suggests the existence" of some special economic power, i.e. coercion.

Carpa was a lawsuit by franchisees against their franchisor in which the plaintiff franchisees established a "patterned practice" of the franchisor's conditioning the license of its trademark on the agreement by the franchisees to purchase or lease food, equipment, supplies, fixtures, furnishings and real estate from the franchisor. The Court of Appeals at p. 69,403 noted that the trial judge had:

> ...instructed the jury that before they could find a violation of the law the plaintiffs must prove:
> (1) that the scheme in in question involved two distinct items and provides that one (the tying product) may not be obtained unless the other (the tied product) is also purchased;

(2) That the tying product possesses sufficient economic power appreciable to restrain competition in the tied product market; and

(3) That a "not insubstantial" amount of commerce is affected by the arrangement.

This list of elements constituting an illegal tie-in is identical to the elements which the trial judge in the instant case held to be necessary to establish an illegal tie-in. In both instances the alleged element of "coercion" is conspicuous solely by its absence. The Court of Appeals at p. 69,403 affirmed the District Court's charge holding:

> We think this charge submitted the issues in intelligible terms and that the Court fell into no error when it declined to propound special interrogatories to the jury on these points individually. The jury was told what it takes to constitute an illegal tie under the Sherman Act and the submitted interrogatory directed the jurors, if they could agree on it, to answer "yes" or "no" as to whether an illegal tying arrangement had, in fact, existed. Viewing the charge as a whole, we think the issue of the existence of an antitrust violation was fairly submitted, that there is no reason to fear that the jury misunderstood the <u>indispensable requisites</u>. (emphasis added)[1]

This decision of the Fifth Circuit Court of Appeals is in accordance with the decision of the Second Circuit Court of Appeals in <u>Hill v. A-T-O, Inc., et al.</u>, 1976 - 1 Trade Cases ¶60-873 (2d Cir. May 10, 1976), and is diametrically opposed to the decision of the Court of Appeals in the instant case.[2]

The evidence in the <u>Carpa</u> case also established that the franchisee had to pay the franchisor "prices substantially higher than market" for the tied goods. In the present case the facts demonstrated that each franchisee had to pay the franchisors

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[1]Although the <u>Carpa</u> case, as the instant case, involved a <u>claim</u> by franchisees against their franchisor, the Court of Appeals in <u>Carpa</u>, as did the District Court in the instant case, took specific note of the adverse effect a tie-in has on the competitors of the franchisor. As the District Court noted in the instant case, this adverse effect on the competitors of the franchisor is not in any way dependent on the presence of an additional element of "individual coercion".

[2]See also p. 69,402 of the <u>Carpa</u> decision where the Court of Appeals rejects defendant's contention that, for an illegal tie-in to exist, its trademark must have a "coercive attractiveness".

from $7,000 to $20,000 more for the tied equipment packages than it would have to pay on the open market or directly from defendant's own sole supplier. (See p. 13 fn. 10 of Petition.)

Relying on this Court's decision in Fortner v. United States Steel, supra, the Fifth Circuit Court of Appeals in Carpa, supra at p. 69,403 held that:

> In the absence of another explanation, such an extensive price differential alone suggests the existence of some special economic power. (emphasis added)

This position is identical to the position taken by the petitioners in this case and accepted by the District Court. The Circuit Court of Appeals in the instant case erroneously reversed and held that the acceptance of a burdensome tie by a substantial number of purchasers can never be used to establish a prima facie case. That position is in conflict with Fortner and Carpa and must not be allowed to stand.

* * *

Respondents attempt to distinguish Hill, supra, is both factually and legally erroneous. Respondents are forced to rely on superficial distinctions with no difference. The fact is that the District Court in the Hill case was faced with a contention identical to the one made by the defendants and adopted by the Court of Appeals in this case, i.e. that in order to establish an illegal tie-in a plaintiff must prove the element of "actual coercion". As in the instant

case, the plaintiffs in the Hill case sought to prove a company-wide policy of tie-ins. (See pp. 2-3 of Petitioners' Reply Brief.) However, unlike the Court of Appeals in this case, the Court of Appeals in the Hill case specifically held that allegations and proof of "actual coercion" were not necessary since:

* * *

> An unremitting policy of tie-in, if accompanied by sufficient market power in the tying product to appreciably restain competition in the market for the tied product constitutes the requisite coercion under Capital Temporaries, given foreclosure of a not insubstantial volume of interstate commerce. See, e.g., Fortner v. United States Steel Corp., supra; Northern Pacific Railway Co. v. United States, supra. (Carpa at p. 68,825)

The language of the Court of Appeals in the Second Circuit, cited above, is virtually identical to the language of the District Court in the instant case, and merely restates that when traditional elements are present, the "requisite coercion" is established.

Thus, respondent's statement that: "There is plainly no conflict between Hill and the decision below." (Respondents' Supplemental Memorandum, p. 3), cannot stand up to scrutiny. A recent class

action decision in Milonas, et al. v. Amerada Hess Corp., United States District Court for the Southern District of New York, 73 Civ. 4263 (JMC) (August 19, 1976) expressly finds a conflict between Hill and the case at bar. Milonas involved an allegation that defendant, an oil company, illegally tied the defendant's trade name to various other items involved in the operation of a gasoline station. The defendant in Milonas asserted that Ungar v. Dunkin' Donuts of America, Inc., 513 F.2d 1211 (3d Cir. 1976) precluded class certification because of the "individual coercion" argument. However, the court in Milonas rejected defendant's argument and held that the tying issue could be certified as a class relying on Hill:

> Whatever Ungar's implications suggest for the case at bar, a recent decision in this circuit [Hill] indicates that it [Ungar] is less than compelling authority. (Slip Op. p. 8)

The court in Milonas then went on to quote the "unremitting policy" language of Hill noted supra. Then the court in Milonas stated:

> Given this statement of the law [Hill] the following questions must be determined in this lawsuit on the issue of coercion: (1) Does Hess have an 'unremitting policy of tie' in? (2) Does Hess have sufficient market power in the tying product of appreciably restrain competition in the market for the tied product? The Court finds that these questions are common to the class members and will not require different proof for each member. (Slip Op. p. 9)

The decision of the Fifth Circuit Court of Appeals in Carpa supports the decision of the Second Circuit Court of Appeals in Hill as do the prior decision of this Court. The decision of the Court of Appeals in the instant case is contrary to the decisions of this Court and is contrary to the decisions of the Second Circuit Court of Appeals in Hill, and the Fifth Circuit Court of Appeals in Carpa. Therefore, this Court should grant this Petition and issue a Writ of Certiorari to the Court of Appeals for the Third Circuit.

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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1636

DAVID UNGAR, et al.
and
JOHN RADER, et al.,

Petitioners,

v

DUNKIN' DONUTS OF AMERICA, INC., et al.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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APPENDIX A.

IN THE
UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania.

Civil Action No. 72-88.

DAVID UNGAR,
JOHN MILLER
and
L-JOLY FOODS, INC.

v.

DUNKIN' DONUTS OF AMERICA, INC.
and
QUINCY ADAMS DONUTS, INC.

Civil Action No. 72-1526.

JOHN RADER,
BCR DONUT CORPORATION,
RAHWAY DONUT CORPORATION,
GLORIA DONUT CORPORATION,
CRAIG DONUT CORPORATION,
KIMBERLY DONUT CORPORATION,
PETER PALLANTIOS,
PALLAS, INC.,
HARPAL DONUTS, INC.,
FRANKFORD AVE. DONUT CORPORATION,
WEST CHESTER DONUTS, INC.,

JAMES CERAJEWSKI,
WOODMAR DONUTS, INC.,
JOSEPH GIANNUZZI,
NEW DORP DONUTS, INC.,
DICK BURWELL,
BURWELL, INC.,
A & D DONUTS, INC.,
DA-MAREN, INC.
JOSEPH DARATONY,
DARA, INC.,
STEVEN A. HUDOCK,
FORT EMMONS DONUTS, INC.,
ROBERT OLIVIERI,
MICHAEL OLIVIERI,
MARTIN J. OLIVIERI,
PAUL SCARANGELLO,
MARTIN DONUT SHOPS, INC.,
PENN HILLS DONUT SHOPS, INC.,
PAMA INDUSTRIES, INC.,
HAROLD WAINROBER,
D & H DONUTS, INC.,
YOUSEF M. HEGAZI,
SELJO, INC.,
KENNETH SWAHN,
GREG THOMAE, D/B/A BROADWAY DONUTS

v.

DUNKIN' DONUTS, INC.

AND

DUNKIN' DONUTS OF AMERICA, INC.

Opinion and Order.

BECKER, *J.* March 12, 1975.

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I. Preliminary Statement.

Before us are motions for class action determination under F. R. Civ. P. 23(b)(2) and (3) in consolidated franchise antitrust suits brought against Dunkin' Donuts Inc. and its wholly owned subsidiary, Dunkin' Donuts of America Inc. (hereinafter collectively Dunkin Donuts), by 14 of its present and former franchisees. Dunkin Donuts is the nation's largest coffee and doughnut franchise system. The plaintiffs, by virtue of their motions, seek to represent over 400 present Dunkin Donuts franchisees and approximately 200 former franchisees in claims for damages as well as declaratory and injunctive relief.[1] Plaintiffs' claims are bottomed principally upon alleged violations of § 1 of the Sherman Antitrust Act, 15 U. S. C. § 1 (1958), although they have also asserted counts based upon breaches of contract and fiduciary duty.

The claims presented by the plaintiffs in their complaints and class action papers are voluninous. In sum, they are a chronicle of the contemporary franchisee's recriminations against the franchise system in which he is enmeshed; indeed, they constitute a veritable jeremiad. These accusations and lamentations, couched of course in legal terms, span much of the range of the antitrust laws and consume 18 pages in the *Rader* complaint. Not all of the allegations are pressed, and for purposes of the present motions we are concerned principally with the allegations of anticompetitive ties of real estate, equipment and supplies, "oppressive" restrictive covenants, and misappro-

1. According to the information supplied to us by the parties, there are presently 780 Dunkin Donuts shops in the United States, Canada and Puerto Rico. There are approximately 563 present franchisees, of whom 95 are multiple owners (with 2 to 10 shops) accounting for some 263 shops. The number of former franchisees is not precisely known, but the best information received to date indicates that they number over 200.

priation of the franchisees' advertising and real estate tax escrow funds.

As the reader will note from the caption, there are two actions before us. While their allegations are for the most part woven into a common skein, there is an important distinction between them. The *Ungar* case, unlike the *Rader* case, stems from a franchise agreement signed before November 1, 1970. On that date Dunkin Donuts altered its basic form franchise agreement in response to the decision of the United States Court of Appeals for the Ninth Circuit in *Siegel v. Chicken Delight, Inc.*, reported at 271 F. Supp. 722 (N. D. Cal. 1967), *modified sub nom. Chicken Delight, Inc. v. Harris,* 412 F. 2d 830 (9th Cir. 1969) [hereinafter *Siegel I*] The fantastic growth of the franchising industry over the past decade has spawned a multitude of franchise antitrust actions, so that the matter before us is but another on a burgeoning roll. However, the *Siegel* litigation, which culminated in *Siegel II,* 448 F. 2d 43 (9th Cir. 1971), *cert. denied,* 405 U. S. 955 (1972), is a benchmark and a point of demarcation as well. Therefore, a brief discussion of its import is necessary at the outset of this opinion.

In *Siegel,* which also involved a fast food franchise operation, franchisees of Chicken Delight sought treble damages for injuries allegedly resulting from illegal restraints imposed by Chicken Delight's standard form franchise agreement. That agreement required that franchisees purchase certain essential cooking equipment, dry mix food items and trademark-bearing packaging exclusively from Chicken Delight as a condition of obtaining its trademark license to operate home delivery and food pickup stores. In *Siegel I* the court certified a class consisting of all Chicken Delight franchisees. In *Siegel II* the holding of the district court that the contractual require-

ments constituted a tying arrangement in violation of the Sherman Act was affirmed by the court of appeals. *Siegel II* also held: (1) that the Chicken Delight trademark, logo and method of operations constituted a tying item separate and distinct from the packaging, mixes and equipment; (2) that the unique registered trademark, in combination with its demonstrated power to impose a tie-in, established as a matter of law the existence of sufficient market power to bring the case within the Sherman Act; and (3) that the tie could not be justified as a reasonable device for measuring and collecting revenue, as a device to protect a new business in accordance with the doctrine of *United States v. Jerrold Electronics Corp.,* 187 F. Supp. 545 (E. D. Pa. 1960), *aff'd per curiam,* 365 U. S. 567 (1961), or as a means of preserving market identity or quality of the franchisor's product.

A tie is classically defined as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pacific Railway Co. v. United States,* 356 U. S. 1, 5-6 (1958) (footnote omitted). In the wake of *Siegel II,* many (and probably most) firms engaged in the franchising eliminated overt tying provisions from agreements with their franchisees. Dunkin Donuts' November 1, 1970 modification of its standard form contract, for instance, was made to eliminate a provision which required a franchisee to purchase from Dunkin Donuts the equipment package necessary to operate the franchised business. In plaintiffs' view, however, *Siegel* did not mark the end of unlawful tying practices in the franchise industry, but rather signalled the beginning of a new era in which unlawful ties and other anticompetitive practices would be effected by more subtle and sophisticated means.

Plaintiffs include Dunkin Donuts' practices in their opprobrium.

Almost all of the post-*Siegel* franchise antitrust cases are founded upon claims of unlawful ties. In each of those cases in which class certification was sought, the defendant has, as here, interposed the contention that in the absence of an overt contractual tie an unlawful tying arrangement cannot be established without proof of what is usually described as "individual coercion." Although the individual coercion doctrine has nowhere been explicated in detail, it appears to require proof by the plaintiff of such events and circumstances surrounding the relationship between the franchisor and *each* franchisee as will demonstrate that the franchisee was *coerced* into agreeing to an anticompetitive tie, usually of equipment or supplies. In suits of this type, the franchisor generally asserts that the alleged tie was either sought or voluntarily acquiesced in by the franchisee. Proof of individual coercion by each proposed class member is then said by the franchisor to be the only way to counter the doctrine. The result of the individual coercion doctrine, as it affects a class certification motion, is to escalate the predominance of individual questions over common questions of fact and law, and hence to militate against class action determination under F. R. Civ. P. 23(b)(3).

Plaintiffs concede that they must establish not only that the franchisor possesses the economic power requisite to a tie, but also that the economic power was in fact used. However, they vigorously assert that there is no individual coercion requirement in the law of tying and, alternatively, that even if such a requirement exists in either pure or hybrid form, common questions still predominate for purposes of the class certification motion because of the pervasive effect of company policies in franchise dealings.

These alternative assertions frame the initial undertakings of this opinion: (1) an in-depth analysis of the law of tying, with attention to whether the individual coercion doctrine is a part of the law; and (2) a discussion of how the required use of economic power may be proved.[2]

These are initial or threshold undertakings because we cannot determine whether individual or common questions of fact or law predominate for purposes of Rule 23(b)(3) class certification unless we first survey the law of tying arrangements and determine the nature of proof required to establish an antitrust violation. This type of analysis has often been made at class action determination stages of franchise antitrust cases. *See, e.g., Bogosian v. Gulf Oil Corp.*, 62 F. R. D. 124 (E. D. Pa. 1973); *Abercrombie v. Lum's Inc.*, 345 F. Supp. 387, 390 (S. D. Fla. 1972). While such an analysis is not appropriate as a preliminary determination of the merits, *see Eisen v. Carlisle & Jacquelin*, 417 U. S. 156 (1974), it is proper and necessary in order to determine whether the requisites of Rule 23(b)(3) are satisfied.

An analysis of the law of tying arrangements, as it affects the franchising industry, is not a simple undertaking; in the lower federal courts (see discussion *infra*) the individual coercion doctrine is plainly in the ascendency. Since most tying cases that have reached the United States Supreme Court were brought by the government, that Court has not yet addressed the question of the necessity of proving individual coercion in a private injunctive or

2. During our discourse we will also confront the question of the extent to which the conventional law of tying applies to the alleged supplier tie-in involved in this case. Here, as in most contemporary fast food franchise cases, the franchisor is not the actual seller of the supplies with which the product is made, but instead requires that supplies be purchased from "approved" sources. This is not unlike the situation of the so-called TBA cases, and we will discuss their impact as well.

treble damage class suit where unlawful ties in the franchise industry are at issue. Nevertheless, it is necessary that we survey the Supreme Court's pronouncements in the tying area, and together with an analysis of the lower court cases, do our best to arrive at a synthesis in this enigmatic area of the law.

The issue of predominance of common questions in the tying area is not, however, the sole question of substance before us. Difficult problems are also posed by the plaintiffs' allegations that the various restrictive covenant provisions of the Dunkin Donuts franchise agreement constitute an unreasonable restraint in violation of the antitrust laws. In terms of federal antitrust scrutiny, such allegations force us to enter a relatively nascent area of the law. Moreover, in view of the disparity between present and former franchisees in terms of the relief sought, we must face the problem of whether the representative parties will adequately represent the interests of the class. Finally, in view of the gargantuan nature of the litigation which will confront us if we make a class certification, there is also a difficult question of superiority of the class action form.

In view of the length of the opinion that follows, it is appropriate that we summarize its principal elements here. They are: (1) a discussion of the nature of plaintiffs' class action claims as presented in the complaints and class action papers; (2) an exegesis of the law of tying; (3) an explication of the duality between use of economic power and coercion and a resolution of the tension between the use and coercion concepts; (4) a brief look at some potential defenses to allegedly unlawful ties; (5) an analysis of the antitrust principles relating to restrictive covenants; (6) a survey of the voluminous discovery record taken in connection with the class action motions, which makes reference to Dunkin Donuts' defenses as well as plaintiffs' claims and which attempts to expose the individual versus common issues; (7) a review of the requisites of Rule 23(b)(3); and (8) a discussion of whether the requirements of that rule have been met. For the reasons which will at some length appear, and with certain qualifications and limitations, a class action determination under Rule 23(b)(3) will be made.

II. The Plaintiffs' Class Action Claims.

Plaintiffs' complaints assert myriad claims for relief both under the antitrust laws and the common law. A number of these claims have been abandoned and some are not asserted as class action claims.[3] We will now summarize the principal allegations with respect to which class certification is sought. In this summary we will draw upon the allegations of both the *Ungar* and *Rader* complaints and the class action papers and briefs. We refrain, at this juncture, from surveying the class action discovery record, and from reviewing the defendant's forceful rejoinder to the plaintiffs' claims, preferring to defer these matters to a succeeding section of the opinion. We recite

3. Originally, plaintiffs also asserted: (1) allegations of price-fixing under Section 1 of the Sherman Act; (2) claims of monopolization and attempt to monopolize under Section 2 of the Sherman Act; (3) violations of § 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)(5) promulgated thereunder; (4) allegations of conspiracy to restrain trade in violation of Scetion 1 of the Sherman Act; (5) charges of price and service discrimination under section 2 of the Clayton Act, as amended by section 1 of the Robinson-Patman Act; (6) claims of breach of contract in that, *inter alia,* defendant allegedly failed to cure defects in the building leased from it to plaintiffs and did not use its business expertise and economic power for the *mutual* benefit of the parties as contractually promised; (7) allegations of violations of Sections 38 and 43(a) of the Lanham Act by defendant's false and fraudulent claims to and use of the sole right to the Dunkin Donuts trademark and logo; (8) charges of tortious interference by defendant with the reasonable business expectancies of plaintiffs; and (9) claims of illegal tying under § 3 of the Clayton Act. These claims have either been abandoned or are not asserted as class action claims.

plaintiffs' claims at this early stage so that the discussion of the law of tying and of restrictive covenants which follows will be referable to the facts at bar.

A. *The Equipment Tie-In Claim.*

Plaintiffs claim that Dunkin Donuts has made it a condition of purchasing a Dunkin Donuts franchise that the franchisee buy from or through Dunkin Donuts the extensive equipment package necessary to operate the franchisee's store.

From 1967 until November 1, 1970, Dunkin Donuts' standard contract made it a "prerequisite" to the franchise agreement that the franchisee enter into an arrangement to buy his equipment package from Dunkin Donuts. This package cost the franchisee a total of approximately $32,000 to $42,000, depending upon the time the equipment was purchased, whereas the actual cost of the equipment was allegedly only $20,000.[4]

On November 1, 1970, Dunkin Donuts amended the Equipment Agreement to provide that the franchisee had a 30 day option to purchase the equipment from a source other than Dunkin Donuts. Plaintiffs assert, however, that the thirty day period still resulted in the imposition of an illegal tying arrangement upon the franchisees for two reasons. First, they contend that the revised clause provides

4. The equipment sold by Dunkin Donuts in the equipment package is manufactured by various concerns. Thereafter, such concerns sell the separate pieces of equipment to Paramount Fountain and Restaurant Supply Company, Dunkin Donuts' sole authorized supplier for equipment, which coordinates the equipment package from items that meet Dunkin Donuts' specifications. When this is done, Paramount sells the entire package to Dunkin Donuts for resale by Dunkin Donuts to its franchisees. Some of the items comprising the equipment package are mixers, friers, proofers, cutting benches, refrigerators, finishing tables, doughnut machines, bins and racks and pans, doughnut cutters, knives, tea and coffee dispensers, and even ashtrays, bulletin boards, clipboards, stepladders and mop handles.

insufficient time for the uneducated franchisee to go out into the market and purchase and finance the required items.[5] Second, they submit that, in any event, those individuals who inquired about the thirty-day option were pressured by Dunkin Donuts not to purchase the equipment on their own, a pressure which allegedly was successful because of the dominant role of Dunkin Donuts over the franchisee.

Plaintiffs contend that the pre-November 1, 1970 equipment tie provision of the franchise agreement was resolutely enforced and that the policy which it reflected was nonetheless effectively continued after November 1, 1970, with the result that both before and after November 1, 1970, virtually every franchise operator has purchased the entire equipment package from Dunkin Donuts. It is asserted that over $1 million worth of equipment sales has thereby been foreclosed to competing firms in the restaurant equipment business.

B. *The Supplier Tie-In Claim.*

Prior to 1966, Dunkin Donuts' franchise agreement required the franchisees to purchase materials from Dunkin Donuts or from sources approved by it. In 1966, defendant altered the Franchise Agreement whereby the franchisee could purchase materials from "non-approved vendors" so long as the "non-approved vendors" could meet Dunkin Donuts' specifications and then become ap-

5. Plaintiffs contend that had Dunkin Donuts provided the franchisees more time—at least ninety days—to obtain the equipment, they would have been able to purchase the equipment from sources other than Dunkin Donuts and at a considerably lower cost. Thus, although subsequent to November 1970, the defendant added a franchise fee and reduced the cost of the equipment package to the franchisee to $27,000, the plaintiffs contend that the $27,000 price exceeded the actual cost of $20,000 at which the franchisees could have obtained the items from other sources.

proved suppliers. The five major categories of supplies involved are flour, shortening, fillings, paper products and coffee. According to the complaints,[6] the defendant receives kickbacks and a grand opening contribution from these approved suppliers. Plaintiffs assert that in order to secure the first order in the franchisee's store, which is placed by Dunkin Donuts, the vendor must contribute anywhere between $50 and $750 to the defendant. In order to reimburse the vendor for this cost, through subsequent dealings with the franchisee, the plaintiffs assert that there is substantial pressure on the franchisee to retain the original Dunkin Donuts selected vendors and not to purchase supplies from vendors of his own choosing. This pressure, they contend, takes two basic forms: (1) the designation of a particular approved supplier for a new store and threats of disenfranchisement if the franchisee should object and prefer a different approved supplier; and/or (2) dilatory and obfuscatory methods set up by the defendant specifically to deal with problems such as the approval of new suppliers which thereby render the franchisee's freedom of choice a nullity.

It is plaintiffs' claim that Dunkin Donuts' specifications are nothing more than "a vehicle for defendants to receive kick-backs from suppliers, to completely control the operation of the franchisee, to limit the ability of the franchisees to purchase quality supplies from other vendors and to divide or geographically allocate territories to vendors." [7] Plaintiffs assert that Dunkin Donuts' specifications are "useless" and that their primary purpose is as a tool to prevent the utilization by the franchisees of suppliers from whom Dunkin Donuts would not receive "contributions." In sum, plaintiffs allege that Dunkin Donuts'

6. See *Rader* complaint ¶¶ 53(p) to (t); *Ungar* complaint ¶ 31(E).

7. Plaintiffs' Memorandum of Law in Support of Motion for Class Action Determination at 35.

company policy, resolutely enforced, is tantamount to tying to the grant and maintenance of the franchise the obligation to purchase the wares of a limited group of vendors. This policy, according to plaintiffs, has resulted in increased cost to the franchisee since the supplier must pass on the cost of his contributions to Dunkin Donuts by means of higher prices to the franchisee.

C. *The Sign Tie-In Claim.*

Dunkin Donuts has always maintained the policy (through the equipment agreements) that each franchisee must have certain signs located at his store. To effectuate this policy, Dunkin Donuts says that it assists the franchisee in acquiring the signs to be sure they meet its specifications, or alternatively, that it permits the franchisee to purchase the signs directly from Dunkin Donuts. Plaintiffs contend that, in reality, the events which occur when a franchisee wants to purchase a sign or signs on his own track those recited previously; *i.e.*, the franchisee is persuaded to purchase the signs either from Dunkin Donuts or from a company from which the defendant is receiving substantial secret kickbacks. The legal effect of this arrangement, plaintiffs assert, is the imposition of an illegal tying scheme upon the franchisee who, if he were free to choose his sign vendor, would be able to save a considerable sum of money.[8]

D. *The Real Estate Tie-In Claim.*

Plaintiffs contend that the defendant has conditioned the grant of the franchise upon the franchisees' agreement to lease or sublease from Dunkin Donuts, under onerous terms, the premises on which the donut shop is to be operated, and that defendant has prevented plaintiffs from

8. Plaintiffs allege that the signs usually cost the franchisee approximately $6,000, with Dunkin Donuts receiving a kickback of approximately $1800.

acquiring or using their own land and/or buildings for their Dunkin Donuts franchises.[9] The defendant's alleged practice is to sublease the property to a franchisee at a substantial mark-up over the rent that Dunkin Donuts pays the prime lessor. According to plaintiffs, in most instances where a franchisee is permitted to use his own property, he is required to lease the property to Dunkin Donuts which, in turn, sublets it to the franchisee-owner. The foregoing is alleged to constitute an unlawful tying arrangement.

Related to the tying claims are two further contentions. Plaintiffs contend that all of the franchise lease agreements contain a provision for an extra mark-up in the franchisees' rental payments in the event the construction costs of the building exceed Dunkin Donuts estimates thereof. They also aver that since 1966 Dunkin Donuts has charged a 7% override on the gross income of the franchisees when the gross income reaches a certain figure, normally $150,000 to $165,000. While the excess construction cost markup and the lease override do not fit within the traditional framework of tying law, in plaintiffs' view they represent additional rental income to the defendant and hence are part of the tied package deal. The common denominator, they allege, is increased income to Dunkin Donuts, in the name of rent, at the expense of the franchisee.

E. *The Advertising Claims.*

Plaintiffs assert various antitrust and common law claims with respect to the arrangements for advertising between Dunkin Donuts and the franchisees. The Dunkin Donuts franchise agreement specifically states that each franchisee must pay to Dunkin Donuts, as administrator of an "Advertising and Sales Promotion Fund," 2% of the

9. *Rader* complaint ¶¶ 53(aa) to (hh).

franchisee's gross sales.[10] The franchise agreement provides that one half of the money collected will be used by defendant "for advertising, including production expenses, in the advertising area in which the Dunkin Donuts shop is located." The other half of the fund is to be used, at the discretion of the defendant, to provide for administration, merchandising materials and distribution costs. Dunkin Donuts is required to furnish franchisees a statement of receipts and disbursements of the fund, prepared by an independent certified public accountant, for each fiscal year of the fund. As in the case of equipment, supplies and signs, plaintiffs assert that the required advertising contributions are the subject matter of an illegal tying arrangement whereby defendant has tied its advertising program to the franchise name and license.

Plaintiffs' common law claims regarding defendant's handling of the advertising funds are grounded upon alleged breaches of contract and/or fiduciary duty. More specifically, plaintiffs allege that defendant has: (1) used the fund to advertise for new franchisees, for the benefit of the company and not the franchisees; (2) used the monies to make movie films for indoctrination of new and prospective franchisees, and upon discontinuing the practice after franchisee complaints, made no effort, despite requests, to replace the bulk of the monies spent upon expensive cameras and photographic equipment which continued in company use; (3) used the fund as a "catchall" for other charges and to publish the Company Newsletter and to pay for "seminars" for operators of franchised outlets, which were more properly company incurred expenses; (4) refused to render an accurate and/or proper accounting, or any accounting at all, of said Advertising

10. The franchise agreement also requires each franchisee to pay $1,000 to defendant for a grand opening promotional advertising program.

Fund; and (5) compelled franchisees to expend still more monies to receive any benefits.

F. *The Real Estate Tax Escrow Claim.*

Plaintiffs aver that each sublease requires each sublessee (*i.e.*, each franchisee) to pay to defendant, on a monthly basis, 1/12th of the estimated yearly real estate taxes.[11] Plaintiffs allege that Dunkin Donuts has a concomitant fiduciary obligation to each franchisee which requires it to maintain the funds in an interest-bearing account for the benefit of the franchisee. Moreover, according to plaintiffs, defendant has breached its fiduciary duty to the franchisees: (1) by commingling the tax escrow funds with its own funds; (2) by failing in many instances to pay the taxes when they became due; (3) by failing to account for monies in the fund; and (4) by refusing to return monies not needed to cover real estate taxes.

G. *The Restrictive Covenant Claims.*

Plaintiffs seek certification of their prayer for a declaratory judgment invalidating the restrictive covenant clauses in the Dunkin Donuts form franchise agreements. It is plaintiffs' position that these covenants are invalid under common law principles and under the antitrust laws as constituting unreasonable restraints of trade.

Plaintiffs note that each Standard Franchise Agreement contains an in-term and post-term covenant restricting the franchisee from engaging in businesses similar to that of Dunkin Donuts, other than another Dunkin Donuts franchised store. For example, provision 8(A)(2) of the present Standard Franchise Agreement restricts the franchisee in-term, without geographic limit, from owning, engaging in or having any interest in the operation of any

11. *Rader* complaint ¶ 53(ii).

enterprise substantially similar to that of Dunkin Donuts. Provision 8(B)(3) of the same Standard Franchise Agreement states that, during the term of the franchise and for 18 months after the franchise is terminated, licensees may not have interests in similar businesses within 10 miles from an existing Dunkin Donuts shop, "or such other area as arbitrators may decide." [12]

Plaintiffs concede that there are several variants of the restrictive covenant provisions, differing as to geographic and time limits, depending upon the year that the contract was entered into.[13] However, they contend that the restrictive covenant provisions in all of the recent franchise agreements have an overbroad common denominator and that even the most minimal restrictions imposed by Dunkin

12. In all of the Standard Franchise Agreements, the in-term and post-term covenants appear to overlap. That is, although the in-term covenants would seem to apply only during the period in which a franchisee is operating a Dunkin Donuts store, the post-term covenants, as written, likewise cover the in-term period plus further specified periods after the termination of the franchisor-franchisee relationship.

13. For example, the Standard Franchise Agreement that was in use during 1957-63 had an in-term restriction upon entering into similar businesses anywhere in the world. It also dictated that during the term and for 5 years after the term, no licensee could have an interest in a similar business in an area competitive to Dunkin Donuts. The minimum area which was deemed to be competitive was stated as 25 miles from any existing or prospective shop. In 1963 the Standard Franchise Agreement was modified to read that during the term no licensee could enter into a similar business at that location. (This was probably an error in drafting on the part of Dunkin Donuts as it would have been almost physically impossible for any franchisee to operate two distinct doughnut businesses at the same location at the same time.) The post-term restriction provision of the 1963 Agreement, much like that of the 1957 contract, proscribed licensees, during the term and for 5 years after termination, from engaging in businesses similar to Dunkin Donuts in areas within 25 miles of existing shops or such other areas as arbitrators would decide. In 1967 the Standard Franchise Agreement was again amended. The in-term restriction remained the same as that of the 1963 contract. However, the post-term restriction was reduced to two years. The present form (described in the text) was adopted in 1971.

Donuts are not reasonably necessary to protect it. Moreover, plaintiffs contend that the determination of their illegality under the common law or Sherman I tests is ripe for adjudication.

H. *Common Law Fraud Allegations.*

Plaintiffs also seek class certification of their allegations that defendant is liable at common law for material misrepresentations in its pro formas, its literature and in oral statements made to induce prospective franchisees to enter into franchise agreements. Plaintiffs recite a litany of suspect practices which they contend fulfill the requisites of a common law fraud claim. *Inter alia,* they aver that defendant has: (1) misrepresented the amount of gross sales reasonably to be expected in connection with the opening of a Dunkin Donuts store in a given location or area; (2) misrepresented the net profit and cash flow which can be derived from the operation of a Dunkin Donuts franchise at given levels of gross sales; (3) failed to reveal the alleged cost advantage to the franchisee of mass purchasing by Dunkin Donuts; (4) misstated the markup on food supplies or paper goods by defendant; and (5) failed to reveal to plaintiffs that mass purchasing would increase the cost of such products to plaintiffs because of rebates, discounts, commissions, fees and kickbacks, either expressly or as contributions to advertising funds which defendant received from its approved suppliers.

III. THE LAW OF TYING—ECONOMIC POLICY & BASIC PRINCIPLES.

A. *The Economic Policy of the Law; The Per Se Rule.*

As we have noted above, a tying arrangement under the antitrust law is an agreement by a party to sell one

product but only on condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from another supplier.[14]

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14. Tying arrangements may be declared illegal under Section 1 of the Sherman Act, 15 U. S. C. § 1 (1958), or under Section 3 of the Clayton Act, 15 U. S. C. § 14 (1958), or under Section 5 of the Federal Trade Commission Act, 15 U. S. C. § 41 (1958). Section 3 of the Clayton Act provides in pertinent part:

> It shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Courts and commentators have noted several potential distinctions between the Sherman Act § 1 and Clayton Act § 3. First, the Clayton Act provision is confined to ties involving "goods, wares, merchandise, machinery, supplies or other commodities," while section 1 of the Sherman Act prohibits every contract, combination or conspiracy in restraint of trade. In this sense, the Sherman Act may be viewed as more encompassing than the Clayton Act. On the other hand, the Clayton Act provision has been interpreted as more prohibitive since it outlaws ties whose effect "may be to substantially lessen competition, or tend to create a monopoly." This language allows the courts to strike down the ties and anticompetitive practices in their incipiency, while the Sherman Act requires proof of actual restraint of trade. Most commentators, however, believe that section 3 of the Clayton Act and Section 1 of the Sherman Act should be interpreted similarly in regard to their prohibitions concerning tying. *See, e.g.,* Pearson, *Tying Arrangements and Antitrust Policy,* 60 Nw. U. L. Rev. 626, 653 n. 96 (1965); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws,* 72 Harv. L. Rev. 50, 58 (1958).

The weight of authority is to the effect that § 3 applies only if *both* the tying and tied items are "goods, wares, merchandise, machinery, supplies or other commodities." *See, e.g., Advance Business Systems and Supply Co. v. SCM Corp.,* 415 F. 2d 55 (4th Cir. 1969) (repair services not a "commodity" within § 3 of the Clayton Act); *Columbia Broadcasting System v. Amana Refrigera-*

In describing the general policy of the law against tying arrangements, Mr. Justice Black has said in *Northern Pacific Railway Co. v. United States,* 356 U. S. 1 (1958):

> Indeed "tying agreements serve hardly any purpose beyond the suppression of competition." *Standard Oil of California and Standard Stations v. United States,* 337 U. S. 293, 305-06, 69 S. Ct. 1051, 1058, 93 L. Ed. 1371. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products.

Id. at 6 (footnote omitted).

The commentators and the courts are in general agreement as to the underlying economic policy basis of the law's disfavor of tying arrangements. Such arrangements can force a buyer to take a product which he does not want, or at least restrict his choice of supply for the tied product. Tie-ins also foreclose competitors of the seller from the market in the tied product and act as a means

14. (Cont'd.)
tion, Inc., 295 F. 2d 375 (7th Cir. 1961) (advertising not a "commodity" within § 3 of the Clayton Act). The parties agree that the asserted tying items in this case, the trademark or license for the use of the proprietary mark "Dunkin' Donuts" and its logo, are not "commodities" under § 3 of the Clayton Act, and that the case must be viewed against the background of § 1 of the Sherman Act. The plaintiffs have thus abandoned the Clayton § 3 claim pleaded in their complaint. However, for the reasons indicated above, the Clayton Act cases are nonetheless helpful in construing the law. The cases arising under Section 5 of the Federal Trade Commission Act proscribing certain unfair methods of competition, *e.g., F. T. C. v. Texaco, Inc.,* 393 U. S. 223 (1968); *Atlantic Refining Company v. F. T. C.,* 381 U. S. 357 (1965), will be discussed in a separate section of this opinion.

of extending a monopoly in the tying product to the tied product. They hus have adverse impacts upon the buyer, the seller's competitors and the public because of the effect on the market for the tied product.[15]

In his opinion in the important case of *Fortner Enterprises, Inc. v. United States Steel Corp.,* 394 U. S. 495 (1969), discussed at length *infra,* Mr. Justice White expounded upon the underlying economic policy basis of the law of tying as follows:

> There is general agreement in the cases and among commentators that the fundamental restraint against which the tying proscription is meant to guard is the use of power over one product to attain power over another, or otherwise to distort freedom of trade and competition in the second product. This distortion injures the buyers of the second product, who because of their preference for the seller's brand of the first are artificially forced to make a less than optimal choice in the second. And even if the customer is indifferent among brands of the second product and therefore loses nothing by agreeing to use the seller's brand of the second in order to get his brand of the first, such tying agreements may work significant restraints on competition in the tied product. The tying seller may be working toward a monopoly position in the tied product and, even if he is not, the practice of tying forecloses other sellers of

15. *See generally* Austin, *The Tying Arrangement: A Critique and Some New Thoughts,* 1967 Wisc. L. Rev. 88 (1967) [hereinafter cited as Austin]; McCarthy, *Trademark Franchising and Antitrust: The Trouble with Tie-Ins,* 58 Calif. L. Rev. 1085 (1970) [hereinafter cited as McCarthy]; Pearson, *Tying Arrangements and Antitrust Policy,* 60 Nw. U. L. Rev. 626 (1965) [hereinafter cited as Pearson]; Turner, *The Validity of Tying Arrangements Under the Antitrust Laws,* 72 Harv. L. Rev. 50 (1958) [hereinafter cited as Turner]; Comment, *Franchises, Requirements Contracts and Tie-Ins: One Test for a Tangled Two,* 74 Yale L. J. 691 (1965).

the tied product and makes it more difficult for new firms to enter that market. They must be prepared not only to match existing sellers of the tied product in price and quality, but to offset the attraction of the tying product itself. Even if this is possible through simultaneous entry into production of the tying product, entry into both markets is significantly more expensive than simple entry into the tied market, and shifting buying habits in the tied product is considerably more cumbersome and less responsive to variations in competitive offers. In addition to these anticompetitive effects in the tied product, tying arrangements may be used to evade price control in the tying product through clandestine transfer of the profit to the tied product; they may be used as a counting device to effect price discrimination; and they may be used to force a full line of products on the customer so as to extract more easily from him a monopoly return on one unique product in the line.

Id. at 512-514 (footnotes omitted). That the foregoing statement appears in a dissent does not affect the viability of what is perhaps the most comprehensive judicial statement extant of the policy of tying law.[16]

As the foregoing discussion suggests, the economic policy underlying the law of tying has several nuclei. One object of the Supreme Court's concern is the buyer who

16. Mr. Justice White also notes that tie-ins may at times be beneficial to the market. He states that they may facilitate new entry into fields where established sellers have long predominated. They may make possible price cutting in otherwise non-competitively priced products because of the removal of fear of retaliation by the few other producers dealing in the market. They may protect the reputation of the tying product if failure to use the tied product in conjunction with it may cause it to function less effectively. Finally, if the tied and tying products are functionally related, tying arrangements may reduce costs through the savings realized in joint distribution and production.

may be forced to take a product he does not want or whose choice of supply for the tied product is restricted. However, the Court's principal concern seems to be the foreclosure of competition in the tied product and the adverse impact of tying upon the marketplace. In the words of Professor Turner:

> . . . [T]he interest of buyers is not the only legitimate interest at stake. The [Supreme] Court has shown at least equal concern, and in later cases perhaps primary concern, with the interest of competing suppliers of a tied product in free access to the consuming market—a strong desire that competition in the sale of each product should be "on the merits." [17]

Turner, *supra* note 15, at 60. The Court emphasized this point in the *Fortner* case where it said:

> In any event, a narrow focus on the volume of commerce foreclosed by the particular contract or contracts in suit would not be appropriate in this context. *As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition.*

394 U. S. at 502 (emphasis added). The acme of the Court's policy views in this area may be found, however,

17. *Accord,* Pearson, *supra* note 15, at 635: "There is no doubt that a strong strain of competitor protection runs through the current anti-trust law." To buttress this contention, Pearson cites *Brown Shoe Co. v. United States,* 370 U. S. 294 (1962), where virtually the only anticompetitive effect discovered by the Court was that the questioned merger might enable Brown to sell shoes at a lower price, thus making it more difficult for Brown's competitors to compete.

in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134 (1968).

Perma Life was a treble damage suit by dealers who operated Midas Muffler shops under franchises granted by Midas, Inc. The Midas dealers challenged as illegal restraints of trade numerous provisions of the franchise agreement, such as the terms barring them from purchasing from other sources of supply, preventing them from selling outside a designated territory, tying the sale of mufflers to the sale of other products in the Midas line and requiring them to sell at fixed retail prices. The court of appeals held the suit barred because the franchisees were *in pari delicto*, 376 F. 2d 692 (7th Cir. 1967), noting that each of the franchisees had enthusiastically sought to acquire a Midas franchise with full knowledge of these provisions and had "solemnly subscribed" to the agreement containing the restrictive terms. The court of appeals also noted that the franchisees had all made enormous profits as Midas dealers, had eagerly sought to acquire additional franchises and had voluntarily entered into additional franchise agreements, all while fully aware of the restrictions they now challenged. The Supreme Court reversed, adverting to "the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes." 392 U. S. at 138. Speaking for the Court, Justice Black noted:

> The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement.

392 U. S. at 139.

The prime lesson to be garnered from these policy statements is that our analysis of the validity of the arrangements alleged to have been imposed by Dunkin Donuts cannot be limited to a focus upon whether the individual plaintiffs have been injured. Our attention must also be heavily concentrated on the economic injury wrought upon competitors in the tied product and, hence, upon the marketplace and the economy as a whole.

Under the doctrine of *Northern Pacific*, tying agreements are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market and a "not insubstantial" amount of interstate commerce is affected. This *per se* doctrine was itself explicated by Mr. Justice Black as follows:

> Although [Sherman Act § 1] is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which "unreasonably" restrain competition. . . . However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when

undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 210, 60 S. Ct. 811, 838, 84 L. Ed. 1129; division of markets, *United States v. Addyston Pipe & Steel Co.*, 6 Cir., 85 F. 271, 46 L. R. A. 122, *affirmed* 175 U. S. 211, 20 S. Ct. 96, 44 L. Ed. 136; group boycotts, *Fashion Originators' Guild of America v. Federal Trade Comm.*, 312 U. S. 457, 668, 61 S. Ct. 703, 85 L. Ed. 949; and tying arrangements, *International Salt Co. v. United States*, 332 U. S. 392, 68 S. Ct. 12, 92 L. Ed. 20.

356 U. S. at 5.

The *per se* doctrine is not without its critics. *See* Turner, *supra* note 15; Austin, *supra* note 15; Pearson, *supra* note 15. However, it remains the law.[18]

18. The position of the plaintiffs in this lawsuit is that the tying arrangements which they attack constitute *per se* violations. If the practices asserted should not be so construed, the plaintiffs could still proceed upon the theory that the rstraints are unreasonable. Section 1 of the Sherman Act literally proscribes "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." However, the "rule of reason" announced in *Standard Oil Co. v. United States*, 221 U. S. 1 (1911), limits the prohibitions of Section 1 to unreasonable restraints of trade. Inquiry pursuant to the rule of reason has traditionally proceeded according to guidelines formulated by Justice Brandeis in *Chicago Board of Trade v. United States*, 246 U. S. 231, 238 (1918);

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of

B. *Formal Requisites of a Tie.*

Under the Supreme Court cases there are three basic requisites to the establishment of an illegal tie: (1) there must be separate tying and tied products; (2) the seller (here the franchisor) must possess sufficient economic power to appreciably restrain competition in the tied product; and (3) the tying arrangement must affect a "not insubstantial" amount of commerce. We will discuss these requisites *seriatim.*

1. The Tying and the Tied Products.

In order for there to be an unlawful tie, there must be two separate products: a *tying product* which cannot be obtained without the purchase of a *tied product. Times-Picayune Publishing Co. v. United States*, 345 U. S. 594 (1953). The alleged tying product in this case is the Dunkin' Donuts trademark, franchise system and logo. The alleged tied products are principally equipment, supplies and real estate.[19] *Siegel II*, 448 F. 2d 43 (9th Cir. 1971), *cert. denied*, 405 U. S. 955 (1972), is sound authority for the proposition that the franchisor's trademark, system and logo may constitute a separate tying product. The *Siegel II* court's approach was as follows:

18. (Cont'd.)

> intent may help the court to interpret facts and to predict consequences.

Proving that the alleged ties are an unreasonable restraint within the meaning of the "rule of reason" would require a complex determination of their effect upon competition and of the possible justifications for any adverse effect. Such an inquiry would necessitate a complicated and prolonged economic investigation into the franchising industry. At least with respect to the question of anticompetitive ties, plaintiffs have indicated their reliance upon the *per se* rule; they are apparently unwilling to undertake a "rule of reason" burden at trial.

19. Advertising was also alleged to be a tied product, but we reject this theory for the reasons discussed below.

> The historical conception of a trademark as a strict emblem of source of the product to which it attaches has largely been abandoned. The burgeoning business of franchising has made trade-mark licensing a widespread commercial practice and has resulted in the development of a new rationale for trademarks as representations of product quality. This is particularly true in the case of a franchise system set up not to distribute the trade-marked goods of the franchisor, but, as here, to conduct a certain business under a common trade-mark or trade name. Under such a type of franchise, the trade-mark simply reflects the goodwill and quality standards of the enterprise which it identifies. As long as the system of operation of the franchisees lives up to those quality standards and remains as represented by the mark so that the public is not misled, neither the protection afforded the trade-mark by law nor the value of the trade-mark to the licensee depends upon the source of the components.
>
> This being so, it is apparent that the goodwill of the Chicken Delight trade-mark does not attach to the multitude of separate articles used in the operation of the licensed system or in the production of its end product. It is not what is used, but how it is used and what results that have given the system and its end product their entitlement to trade-mark protection. It is to the system and the end product that the public looks with the confidence that established goodwill has created.

448 F. 2d at 48-49 (footnotes omitted). The *Siegel II* court thus concluded that the sale of a franchise license, with the attendant rights to operate a business in the prescribed manner and to benefit from the goodwill of the tradename, in no way requires the forced sale by the

franchisor of some or all of the component articles. Therefore, attempts by tie-ins to extend the trade-mark protection to common articles (which the public does not and has no reason to connect with the trade-mark), simply because they are said to be essential to production of that which is the subject of the trade-mark, cannot escape antitrust scrutiny.

We add here only our disagreement with the contention of the plaintiffs that advertising can be a separable, tied product. Relevant advertising is inextricable from the trademark, franchise system and logo as it is the major vehicle for promoting them. *Kugler v. AAMCO Automatic Transmissions, Inc.*, 460 F. 2d 1214 (8th Cir. 1972). Our holding on this point, however, is confined to advertising that arguably promotes the interest of the entire franchise system and not merely the interests of the franchisor alone. On the other hand, the equipment, supplies and real estate may be considered separate (and therefore potentially tied) products since the public does not have any reason to connect them with the trademark itself. *But cf. In re 7-Eleven Franchise Antitrust Litigation,* 1974-2 Trade Cas. ¶ 75,429 (N. D. Cal. 1974).

2. Sufficient Economic Power to Appreciably Restrain Competition in the Tied Product.

A. QUANTUM OF THE POWER.

In order for an illegal tie to exist, the tying product must have sufficient economic power or advantage to appreciably restrain competition in the tied product. *Northern Pacific Railway Co. v. United States,* 356 U. S. 1 (1958). The standard of "sufficient economic power" does not require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Indeed, *Fortner Enterprises, Inc. v. United*

States Steel Corp., 394 U. S. 495 (1969), made it clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market. 394 U. S. at 502-03. Mr. Justice Black explained:

> These decisions rejecting the need for proof of truly dominant power over the tying product have all been based on a recognition that because tying arrangements generally served no legitimate business purpose that cannot be achieved in some less restrictive way, the presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie. Such appreciable restraint results whenever the seller can exert some power over some of the buyers in the market, even if his power is not complete over them and over all other buyers in the market. . . . [D]espite the freedom of some or many buyers from the seller's power, other buyers—whether few or many, whether scattered throughout the market or part of some group within the market—can be forced to accept the higher price because of their stronger preferences for the product, and the seller could therefore choose instead to force them to accept a tying arrangement that would prevent free competition for their patronage in the market for the tied product. Accordingly, the *proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.*[20]

394 U. S. at 503-04 (emphasis added).

20. *Fortner* represents an extension of *Northern Pacific* in this area. It is noteworthy, however, that in *Northern Pacific* the Court rejected the use by the Court in *Times-Picayune Publishing Co. v.*

B. PROOF OF EXISTENCE OF ECONOMIC POWER.

It was established in *Northern Pacific* that distinctiveness and the existence of the tying arrangement were themselves sufficient proof of economic power in the tying product to find an illegal tie. In *Northern Pacific* the tying product was a unique leasehold or ownership of uniquely placed land. The Northern Pacific Railroad had initially been granted large acreages. This land was strategically located in checkered fashion amid private holdings and within economic distance of transportation facilities. Not only the testimony of various witnesses but common sense made it evident to the Court that this particular land was often prized by those who purchased or leased it from Northern Pacific and was frequently essential to their business activities. The defendant entered into contracts of sale or lease covering at least several million acres of land which included "preferential routing" clauses. These clauses compelled the lessee or land purchaser to ship over Northern Pacific's lines all commodities produced or manufactured on the leased or purchased land (provided that Northern Pacific's rates were equal to those of competing carriers). Mr. Justice Black there-

20. (Cont'd.)
United States, 345 U. S. 594 (1953), of the term "monopolistic position" which had suggested a return to the "dominance" test implied by the early Clayton Act cases. *Northern Pacific* undercut the language of *Times-Picayune* and reaffirmed the broader *per se* principles enunciated earlier in *International Salt Co. v. United States*, 332 U. S. 392 (1947):

> While there is some language in the Times-Picayune opinion which speaks of "monopoly power" or "dominance" over the tying product as a necessary precondition for application of the rule of *per se* unreasonableness to tying arrangements, we do not construe this general language as requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product (assuming all the time, of course, that a "not insubstantial" amount of interstate commerce is affected).

356 U. S. at 11. *See also* Turner, *supra* note 15.

upon observed: "The very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power at least where, as here, no other explanation has been offered for the existence of these restraints.[21]

Northern Pacific was followed four years later by *United States v. Loew's Inc.*, 371 U. S. 38 (1962). *Loew's* was a civil suit brought by the Justice Department against six major distributors of pre-1948 copyrighted motion picture films for television exhibition, claiming that each defendant had engaged in "block booking" in violation of § 1 of the Sherman Act. Defendants allegedly had, in selling to television stations, conditioned the license or sale of one or more feature films upon the acceptance by the station of a package or block containing one or more unwanted or inferior films. According to Mr. Justice Goldberg, the "successful pressure" applied to television station customers to accept inferior films along with desirable pictures was the gravamen of the complaint. He ultimately concluded on the proof of economic power issue:

> Even absent a showing of market dominance, the *crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.*
>
> The requisite economic power is presumed when the tying product is patented or copyrighted. . . . This principle grew out of a long line of patent cases which had eventuated in the doctrine that a patentee who utilized tying arrangements would be denied all relief against infringements of his patent.

21. In so holding, the majority rejected the contention of Mr. Justice Harlan that testimony should have been taken on: (1) the relative strength of Northern Pacific's land holding in the appropriate market; (2) the issue of "uniqueness"; and (3) the extent to which the location of the lands, in fact, put Northern Pacific in a strategic position.

371 U. S. at 45-46 (emphasis added) (footnote omitted).[22] This quoted language from *Loew's* represents a further liberalization of the proof of economic power requirement. In *Northern Pacific* the requirement evolved from dominance to distinctiveness; the Court in *Loew's* permits the drawing of an inference of economic power merely from the tying product's desirability to the consumer.

Fortner Enterprises, Inc. v. United States Steel Corp., 394 U. S. 495 (1969), the Court's latest pronouncement, does not retrench. The *Fortner* case allows a jury to infer sufficient economic power over the tying product from varied kinds of evidence. Proof that an appreciable number of buyers may have accepted a burdensome term such as a tie-in may raise an inference of sufficient economic power. Alternatively, a jury may draw such an inference from the fact that buyers were willing to pay a higher than competitive price for the tied product.[23]

22. *See also, e.g., Motion Picture Patents Co. v. Universal Films Mfg. Co.*, 243 U. S. 502 (1917), *Carbice Corp. v. American Patents Development Corp.*, 283 U. S. 27 (1931); *Leitch Mfg. Co. v. Barber Co.*, 302 U. S. 458 (1938); *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U. S. 488 (1942). The extension from the patent into the copyright area occurred in *United States v. Paramount Pictures, Inc.*, 334 U. S. 131 (1948), where the Court proscribed block booking of copyright films under § 1 of the Sherman Act. The *Paramount* Court presaged *Loew's* by implying that dominance in the tying product would be presumed on a mere showing that the tying product had some element of distinctiveness.

23. In *Fortner* the alleged tie lay in an arrangement pursuant to which the purchaser was required to take a tied product—prefabricated homes—as a condition of being allowed to purchase the tying product—credit—from U. S. Steel Homes Credit Corp., a subsidiary of United States Steel. The affidavit of Fortner's president stated that competitors of U. S. Steel sold prefabricated houses and built conventional homes for at least $400 less than U. S. Steel's price for comparable models. Since in a freely competitive situation buyers would not accept a tying arrangement obligating them to buy a tied product at a price higher than the going market rate, this substantial price differential with respect to the tied product (prefabricated houses) in itself suggested to the court that U. S.

Refining the language of *Loew's, Fortner* explains that uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive products themselves. Such barriers may be legal, as in the case of patented and copyrighted products (*e.g., International Salt Co. v. United States,* 332 U. S. 392 (1947)), or physical, as where the product is land (*e.g., Northern Pacific Railway Co. v. United States,* 356 U. S. 1 (1958)). As the foregoing discussion indicates, the Court's decisions in this area reflect a clear trend: that of a steady diminution in the strictness of proof required to establish the economic power requisite of an unlawful tie. In the words of a leading commentator:

> There is no doubt that the Supreme Court's attitude towards the use of the tying arrangement has become increasingly harsh. The character of the market control that must be exerted by the producer of the tying product so as to furnish a basis for successful prosecution has shifted dramatically from *United Shoe's* almost complete (ninety-five percent) dominance to the minimal "sufficient economic power" of the *Northern Pacific* decision. Thus, one could argue that there has been a discernible and persistent move towards making the tie-in a per se violation in the

23. (Cont'd.)
Steel had some special economic power in the credit market. In addition, Fortner's president stated that he accepted the tying condition on respondents' loan solely because the offer to provide 100% financing, lending an amount equal to the full purchase price of the land to be acquired, was unusually and uniquely advantageous to him; he found that no similar financing was available to his corporation on such inexpensive terms from any other source during the 1959-1962 period. Although the Court noted that market power cannot be inferred simply because the kind of financing terms offered by a lending company are unique and "unusual," it observed that uniquely and unusually advantageous terms can reflect a creditor's distinctive economic advantage over his competitors. The grant of summary judgment for the defendant was reversed.

> accepted sense of the term. *Loew's* seems to confirm this trend with express mention that consumer desirability or uniqueness of the tying product satisfies both the marked dominance and "economic power" criteria.

Austin, *supra* note 15, at 109-10.

The Supreme Court has not yet been called upon to decide whether economic power may be presumed from the uniqueness or distinctiveness or legal exclusivity of a trademark, franchise system or logo. However, the Ninth Circuit Court of Appeals in *Siegel II* has done so:

> Just as the patent or copyright forecloses competitors from offering the distinctive product on the market, so the registered trade-mark presents a legal barrier against competition. It is not the nature of the public interest that has caused the legal barrier to be erected that is the basis for the presumption, but the fact that such a barrier does exist. Accordingly we see no reason why the presumption that exists in the case of the patent and copyright does not equally apply to the trade-mark.

448 F. 2d at 50 (footnote omitted). *Accord, Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.,* 463 F. 2d 1002 (5th Cir.), *cert. denied,* 409 U. S. 1086 (1972); *Redd v. Shell Oil Co.,* 1974-2 Trade Cas. ¶ 75,390 (D. Utah 1974); *Falls Church Bratwursthaus v. Bratwursthaus Management Corp.,* 354 F. Supp. 1237 (E. D. Va. 1973). We agree.[24]

24. In so holding, we are not unmindful of the recent decision in *Capital Temporaries, Inc. v. The Olsten Corp.,* 365 F. Supp. 888 (D. Conn. 1973), *aff'd;* 974 Trade Cas. ¶ 75,303 (2d Cir. 1974). That case dealt with a trademarked franchise system engaged in the business of supplying temporary personnel to customers for "white collar" jobs. Plaintiff, after operating an Olsten's franchise

3. The Requisite That a "Not Insubstantial" Amount of Commerce Be Affected.

To find an illegal tying agreement one must also determine that the alleged tie affects a "not insubstantial"

24. (Cont'd.)
for several years, repudiated the franchise agreement and in an antitrust suit asserted, *inter alia,* that in order to obtain an Olsten white collar franchise, he was also required to establish and operate a blue collar operation under the "Handy Andy Labor" trademark. He alleged in his complaint that this constituted an illegal tie, the tying product being "Olsten," and the tied product being "Handy Andy Labor." For reasons discussed in the text *infra,* the district court granted summary judgment for the defendant on the tie-in claim and the court of appeals affirmed. We address here only that portion of the opinion of Judge Mulligan for the court of appeals rejecting the contention that, since the service franchised to the plaintiff was trademarked, the economic power of the defendant must be presumed.

Judge Mulligan first noted that no Supreme Court decision has gone any further than to presume economic power in those cases where the tying product is patented or copyrighted. He then observed that the trademark or name "merely identifies the franchisor," and pointed out that there was no suggestion in the record of any uniqueness in the techniques of Olsten that could not be offered by others. Indeed, in Judge Mulligan's view, "since almost everything sold today is trademarked," the consequence of adopting the franchisee's position would be "troublesome." Recognizing that *Siegel II* and *Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.,* 463 F. 2d 1002 (5th Cir.), *cert. denied,* 409 U. S. 1086 (1972) hold *contra,* Judge Mulligan also cited to the decision in *Susser v. Carvel Corp.,* 332 F. 2d 505 (2d Cir. 1964), *cert. dismissed,* 381 U.S. 125 (1965), which held that a trademark *qua* trademark is not a sufficient indication of dominance over the tying product to qualify for *per se* treatment under *Northern Pacific.*

We do not believe that *Capital Temporaries* is apposite here, for it appears unquestionable that, at a trial on the merits, the trademark, franchise system and logo of Dunkin Donuts will emerge as far more distinctive than that of Olsten's. In any event, we prefer to follow the *Siegel* view on the impact of a trademark as proof of requisite economic power. *See also Redd v. Shell Oil Co.,* 1974-2 Trade Cas. ¶ 75,390 (D. Utah 1974); *Falls Church Bratwursthaus v. Bratwursthaus Management Corp.,* 354 F. Supp. 1237 (E. D. Va. 1973). We note too that the *Susser* dominance test to which Judge Mulligan adverts was completely undercut by the Supreme Court's decision in the *Fortner* case.

amount of commerce. *International Salt Co. v. United States,* 332 U. S. 392 (1947). In *International Salt* the defendant leased dispensing machines—Lixators and Saltomats—only on the condition that the lessees purchase from defendant all their requirements of salt for use in the machines. The Lixator contracts imposed the purchase requirement only if defendant's price was competitive; the Saltomat contracts guaranteed to the purchasers that they would get International's own lowest price. The Court unanimously affirmed a summary judgment holding the contracts unlawful not only under Section 3 of the Clayton Act, but also under Section 1 of the Sherman Act. In the Court's view, it was:

> unreasonable, *per se,* to foreclose competitors from any substantial market. . . . The volume of business affected by these contracts [$500,000 worth annually] cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious.

332 U. S. at 396. *International Salt* thus made clauses tying unpatented materials to a patented product or process illegal *per se,* provided that they foreclose a dollar amount of commerce that "cannot be said to be insignificant. . . ." *Id.*

In *Fortner Enterprises, Inc. v. United States Steel Corp.,* 394 U. S. 495 (1969), the Court also had occasion to address this subject and, in effect, liberalized the *International Salt* criteria. The *Fortner* Court not only made it clear that the "not insubstantial" requirement makes no reference to the scope of any particular market or to the share of that market foreclosed by the tie, but also added that:

. . . normally the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimus,* is foreclosed to competitors by the tie. . . .

394 U. S. at 501. The Court held that the relevant figure is the total volume of sales tied by the policy under challenge, not the portion of this total amount applicable to the particular plaintiff who brings suit. 394 U. S. at 502. It does not appear, in view of the substantial dollar volume involved in the present case with respect to purchases or leases of the alleged tied items, that Dunkin Donuts will refute plaintiffs' contentions that a "not insubstantial" amount of commerce is involved.

C. *Does the Traditional Law of Tying Apply Where There Is Split Ownership of the Tying and the Tied Products The "TBA" Cases and the Franchise Cases.*

In outlining the nature of the plaintiffs' supply tie-in claims, we noted that under the terms of the franchise agreement the franchisee is obligated to purchase supplies not from Dunkin Donuts, but from certain approved suppliers, thus rendering Dunkin Donuts the seller of the tying product (the franchise) but not of the tied product.[25] We have also noted that the conventional case law definition of the tying arrangement assumes a single seller using the market power of one product as a means of inducing the purchaser to buy a second product. The question thus arises as to whether the traditional law of tying, which we

25. Dunkin Donuts is not a manufacturer of the equipment package required to operate a Dunkin Donuts shop. However, Dunkin Donuts sells to its franchisees the equipment assembled by Paramount Equipment Company of Providence, Rhode Island, and sold by Paramount to Dunkin Donuts. Hence, there is no split ownership with respect to equipment.

have already analyzed in part, applies where there is split ownership between the tying and the tied products.[26]

Profesor Austin has observed that it is inappropriate to focus solely upon the seller's position, for the relevant factor is the overall impact of the arrangement on the purchaser and the manner in which it affects his decision-making:

If a business must purchase a second "tied" product in order to obtain the use of an item that is necessary to continued market survival, it makes little difference whether there is a single or dual source for the tying and tied products. In either case the decisional range is the same—do without the desired item or purchase both the principal and ancillary products.

In view of the above analysis it is suggested that a tie-in exists whenever a vendee is persuaded to purchase one item or avail himself of a service as a condition for obtaining a second item—*regardless of the source of either product* (or service, as the case

26. The practice followed by Dunkin Donuts with respect to requiring that its franchisees purchase supplies only through approved suppliers is not uncommon in the franchising industry. See McCarthy, *supra* note 15. However, in the franchise cases the courts have not to date focused upon the question of whether traditional tying law applies where there is split ownership of the tying and the tied products. In *Siegel II* the problem did not arise because the Chicken Delight franchisees apparently purchased the supplies directly from the franchisor, a practice difficult for a national franchisor to duplicate today in view of distribution problems. *Belliston v. Texaco, Inc.*, 455 F. 2d 175 (10th Cir. 1972), and *Lah v. Shell Oil Co.*, 50 F. R. D. 198 (S. D. Ohio 1970) were Sherman Act § 1 cases dealing with claims that oil companies had tied to their franchise the requirement that the service station owners purchase TBA (*Belliston*) or certain unwanted trading stamps and games (*Lah*). Neither court applied a *Northern Pacific* or *Fortner* type analysis to the facts, utilizing instead the analysis from the Supreme Court TBA cases. *See generally* 9 Von Kalinowski, *Antitrust Laws and Trade Regulation* § 65.02[2][b] (1972). However, neither did the *Belliston* and *Lah* courts focus on the split ownership question, and their facts are notably different from those at bar.

> may be). This definition would engender a uniformity of treatment—at least as to section 1 of the Sherman Act and section 5 of the Federal Trade Commission Act. Courts would no longer apply tie-in precedent on an "as if" basis, as was done in the *Atlantic Refining* case. Thus the development of hybrid and quasi-tie-in principles would be precluded. . . .

Austin, *supra* note 15, at 95. Professor Austin's analysis is also consistent with the underlying policy of the law of tying upon which we have already discoursed and its emphasis upon purchaser and consumer protection.[27] We find ourselves in accord with it, and also believe it to be consistent with the caselaw.

The most significant of the split ownership cases reported to date are the so-called "TBA" cases in which the courts have dealt with the efforts of various major oil companies to promote the sales of tires, batteries and accessories through their franchised retail service station dealers in return for a commission on the sale. In *Atlantic Refining Company v. Federal Trade Commission,* 381 U. S. 357 (1965), Atlantic had turned over its TBA business to Goodyear and Firestone which became completely responsible for all TBA sales to Atlantic dealers (and handled warehousing and distribution to them as well). Atlantic sales personnel were instructed to take TBA orders and to actively encourage dealers to buy Goodyear and Firestone products. In return, Atlantic was to receive a 10% commission on the net sales of products by Atlantic dealers. According to the record before the FTC, the Atlantic salesmen were zealous and made it clear to dealers that lease and renewal contracts were dependent upon the acceptance of Goodyear and Firestone TBA.

27. *But cf.* Comment, *Franchises, Requirements Contracts and Tie-Ins: One Test for a Tangled Two,* 74 Yale L. J. 691, 699 (1965).

The Federal Trade Commission held this arrangement to be an "unfair method of competition" prohibited by § 5 of the Federal Trade Commission Act and ordered Atlantic to cease and desist from (1) intimidating or coercing dealers to purchase any particular brand of TBA and (2) making any commission arrangement for sponsoring or promoting TBA sales to its dealers. The Commission's opinion, 58 F. T. C. 309 (1961), is couched in tie-in language and draws heavily from tie-in precedent, including the rationale of *Northern Pacific.* The Supreme Court affirmed, noting that while the Goodyear-Atlantic contract was not a tying arrangement, its central competitive characteristic was the same—the utilization of economic power in one market to curtail competition in another. The Court described the effect of this TBA plan as being "similar to that of a tie-in." 381 U. S. at 371.

In *F. T. C. v. Texaco, Inc.,* 393 U. S. 223 (1968), the Supreme Court held that it was an unfair method of competition in violation of the F. T. C. Act for Texaco to induce its service station dealers to purchase B. F. Goodrich TBA in return for a commission, where Texaco possessed and exercised dominant economic power over its dealers and where anti-competitive results flowed therefrom.[28] The Court again noted that the essential anti-competitive vice of the arrangement was the utilization of economic power in one market to curtail competition in another. It held that in order to establish a § 5 violation the Commission is not required to show that a practice it condemns has totally eliminated competition in the relevant market, but only that the practice in question has unfairly burdened competition for a not insignificant volume of commerce. In so holding, the

28. In the *Texaco* opinion the Court diluted the *Atlantic Refining* coercion standard. This is an important point and will be discussed *infra.*

Court cited *International Salt* and *Loew's,* which are, of course, tying cases.

Plaintiffs have claimed that the Dunkin Donuts' approved supplier system is a sham; that it is a vehicle for the payment of kickbacks and that Dunkin Donuts is unwilling to approve new suppliers, despite ability to meet proper specifications, so as to maintain an anti-competitive (and profitable) tie. Plaintiffs may or may not be able to prove this at trial.[29] In any event, nothing in defendant's brief dissuades us from holding that plaintiffs are not foreclosed from applying traditional tying law analysis to their claim because of split ownership of the tying and tied products in the supply area. For, if plaintiffs are correct, the split ownership cannot erase the fact that the supply sales owe their origin and existence to Dunkin Donuts' willingness to use its leverage.[30]

29. The approved supplier system is generally justified as a vehicle for the franchisor to retain sufficient quality control to protect the integrity of his trademark and franchise system, and the defendant has sought to justify it on that basis here. Thus, it contends, there is no illegality in a system of quality control based on approved suppliers, especially where franchisees are provided a means for securing approval of additional suppliers. Although in the particulars already noted the plaintiffs have contended that the Dunkin Donuts quality control system is a sham, the quality control defense may well prove formidable at trial and, in any event, will be discussed in greater detail below.

30. A franchisor's requirement that a franchisee purchase his supplies only from designated third parties has sometimes been characterized as an exclusive dealing arrangement. *See* Von Kalinowski, *supra* note 26, at § 65.05[B][2]; *Susser v. Carvel Corp.*, 332 F. 2d 505 (2d Cir. 1964), *cert. dismissed,* 381 U. S. 125 (1965); *Barby's Frosted Foods, Inc. v. McDonald's Corp.*, 1973-2 Trade Cas. ¶ 74,622 (D. N. J. 1973). Exclusive dealing contracts are not judged by a *per se* rule. *See Tampa Electric Co. v. Nashville Coal Co.*, 365 U. S. 320 (1961). *Susser* has, however, been undercut by *Fortner* and by *Siegel.* We believe that the exclusive dealing analogy is inappropriate, and that the plaintiffs' approved supplier claim is most appropriately dealt with in tie-in terms. *Accord,* Comment, *Franchisees, Requirements Contracts and Tie-Ins: One Test for a Tangled Two,* 74 Yale L. J. 691, 697-98 (1965).

IV. The Law of Tying Continued: The Requirement of Proof of Use of Economic Power; The Individual Coercion Doctrine and the "Use-Coercion Dialogue".

A. *The Requirement That Economic Power Be Used: A Statement of the "Use-Coercion Dialogue".*

Although *Northern Pacific* and *Fortner* make the possession by the seller (or franchisor) of sufficient economic power to appreciably restrain competition in the tied product the second requisite of an illegal tie, those cases themselves make clear that the plaintiff must prove more than mere possession. For, as Judge Blumenfeld aptly noted in the district court opinion in *Capital Temporaries, Inc. v. The Olsten Corp.*, 365 F. Supp. 888, 892 (D. Conn. 1973), *aff'd* 1974 Trade Cas. ¶ 75,303 (2d Cir. 1974): "[t]he economic power must not simply exist; it must be used." Indeed, the Court's statement of the facts in *Northern Pacific* subsumes such a formulation: "the defendant possessed substantial economic power by virtue of its extensive landholdings which it *used* as leverage . . . ." 356 U. S. at 7 (emphasis added). The use notion is, of course, related to the fact that a tie cannot exist unless the availability of the tying product is conditioned on the purchase of the tied product.[31]

As will be seen, the ultimate disposition of the class action motions will turn on the determination of whether it is sufficient under the law of tying that the plaintiffs show the *use* of (the requisite) economic power, or whether the plaintiffs must, as defendant contends, show

31. To succeed in a claim of unlawful tying, the plaintiff must prove that the tying product was unavailable without the tied product. What is at issue here is the question of proof. In this respect, the issues are similar to those discusssed in the portions of this opinion dealing with proof of the use of economic power. Hence, they will not be separately addressed.

that the power was *used coercively* as to each individual in the putative class. We describe the issue framed by these contending positions as the "use-coercion dialogue." We believe that the dialogue may be illustrated by the following queries. Is it necessary merely that the franchisor use his economic power to achieve the tie, or is it necessary that the franchisor coerce the franchisee, *i.e.*, compel him, after negotiation, to act against his will? Does a tie exist if the franchisee voluntarily seeks the franchisor out and solicits the purchase of the franchisor's package, "lock, stock and barrel"? Does a tie exist if, notwithstanding mental reservations, the franchisee nonetheless voluntarily accepts the tie? Does it matter that the alleged tie is not reduced to boilerplate contractual form? Is it necessary that the franchisee understand the uneconomic nature of the tie? If there is an individual coercion requirement, is it relevant at the liability stage or only on the issue of damages? At either stage, is it the plaintiffs' burden to rule it out or the defendant's burden to prove it?

As we pose these queries, we remain conscious of the fact that the Supreme Court has not set forth a coercion requirement in the tying cases. Indeed, we note that the law comprehends tying suits by foreclosed competitors in which a question of coercion of franchisees seems peripheral at best. *See, e.g., Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.*, 463 F. 2d 1002 (5th Cir.), *cert. denied*, 409 U. S. 1086 (1972); *Kelly v. General Motors Corp.*, C. A. No. 73-51 (E. D. Pa., Huyett, J., Aug. 1, 1974); *N. W. Controls, Inc. v. Outboard Marine Corp.*, 333 F. Supp. 493 (D. Del. 1971); *Record Club of America, Inc. v. Capitol Records, Inc.*, 1971 Trade Cas. ¶ 73,694 (S. D. N. Y. 1971).

We turn now to a development of the use-coercion dialogue thus framed.

B. *A Statement of the Individual Coercion Doctrine; Incipient Flaws in the Doctrine.*

The individual coercion doctrine as it is pressed by Dunkin Donuts in this case postulates that a tie cannot be established in the absence of proof by the plaintiffs of such events and circumstances surrounding the relationship between Dunkin Donuts and each proposed franchisee class member as will demonstrate that the franchisee, after negotiating on the point, was coerced into agreeing to the equipment, supply or real estate tie. This formulation is consistent with the dictionary definition of coercion, which is compulsion to act against one's free will. As will be seen when we survey the class action discovery, Dunkin Donuts asserts that the alleged tie was either sought or voluntarily acquiesced in by the named plaintiff-franchisees. Proof of individual coercion by each of the class members is said to be the only way to counter this defense.

At the outset of this opinion, we took note of *Siegel v. Chicken Delight*, 448 F. 2d 43 (9th Cir. 1971), *cert. denied*, 405 U. S. 955 (1972) [*Siegel II*], wherein there was an express contractual provision requiring that the franchisee purchase all the equipment necessary to operate a Chicken Delight franchise directly from the franchisor. The *Siegel II* court held that the requisite economic power to bring the case within § 1 of the Sherman Act was established as a matter of law by the unique registered trademark in combination with its demonstrated power to impose a tie-in; indeed, a directed verdict for the plaintiff class was affirmed.[32] The *Siegel II* court did not

32. Similar in import to *Siegel II* were *Redd v. Shell Oil Co.*, 1974-2 Trade Cas. ¶ 75,390 (D. Utah 1974); *Falls Church Bratwursthaus v. Bratwursthaus Management Corp.*, 354 F. Supp. 1237 (E. D. Va. 1973); *Butkus v. Chicken Unlimited Enterprises, Inc.*, 1971 Trade Cas. ¶ 73,780 (N. D. Ill. 1971).

discuss the individual coercion doctrine, and neither the defendant here, nor any of the courts upon whose decisions the defendant relies, have suggested that *Siegel II* was decided erroneously because there was no evidence that each of the 650 franchisees involved were coerced to purchase the equipment.[33] Indeed, the leading cases espousing the individual coercion doctrine concede that a class was properly certified in *Siegel I*. *See, e.g., Abercrombie v. Lum's, Inc.*, 345 F. Supp. 387 (S. D. Fla. 1972); *Smith v. Denny's Restaurant, Inc.*, 62 F. R. D. 459 (N. D. Cal. 1974).

Given this background, two questions immediately arise. First, might there not have been Chicken Delight franchisees who, like Dunkin Donuts franchisees, either sought or gladly acquiesced in the equipment tie because, as novices in the field, they were happy not to be bothered with having to secure the various items of equipment? Under Dunkin Donuts' individual coercion theory, was not *Siegel II* wrongly decided as to such franchisees? Plainly, the answer is yes. On the other hand, if *Siegel II* was correctly decided, as the leading cases upon which the defendant relies assume, what difference does it make whether the tie is articulated in the contract or can be proved at trial as having been imposed *sub silentio* through a pervasive and resolutely enforced company policy as is alleged here? Palpably, the answer is none. In this latter regard, Professor Pearson has observed:

> Once the product problem has been hurdled, the court must determine whether a tie-in exists, that is, whether a buyer can buy the tying product only on condition that he take the tied product. Of course, where the condition is express, there is no problem. *But the substance of the condition may exist even if the form doesn't,* and the problem is to determine if, as a practical matter, the buyer must take both products to get one.

33. One court has, however, rendered the interpretation that "a contractual provision is necessarily coercive." *In re 7-Eleven Franchise Antitrust Litigation*, 1972 Trade Cas. ¶ 74,156 (N. D. Cal. 1972).

Pearson, *supra* note 15, at 630 (emphasis added).

The foregoing analysis reveals incipient flaws in the defendant's position and suggests that the dispute between the parties may well resolve into a dispute not over the requisites of a tie, but over the appropriate means of *proving* use of economic power. Thus, it may be that evidence indicating (individual) coercion is but one way of proving use of economic power. However, before determining whether there is a requirement of (individual) coercion in the law, we have several threshold tasks. *First,* we must analyze the individual coercion doctrine in more detail and discuss its etiology. *Second,* we must review the decisions in *F. T. C. v. Texaco, Inc.*, 393 U. S. 223 (1968), and *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134 (1968), to assess their impact upon the question of proof of use of economic power. *Third,* we must address the notion of the "voluntary" tie. *Fourth,* we must consider the role of company policy. And, in the course of our discussion, we must consider the semantic overtones of the problem, for coercion and use of economic power may be but part of the same syndrome and it is possible that by means of linguistic phenomena alone, "coercion" may have assumed an independent viability in the law.

C. *The Cases Positing the Individual Coercion Doctrine: Comment on Their Viability.*

The individual coercion doctrine appears to have sprung mainly from the opinion of the United States Dis-

trict Court for the Southern District of Florida in *Abercrombie v. Lum's Inc.*, 345 F. Supp. 387 (S. D. Fla. 1972). It is *Abercrombie* that is cited in each of the succeeding cases in the line of decisions relied upon by defendant (see p. 57 *infra*).

Abercrombie was a franchise antitrust suit brought by a franchisee against a franchisor engaged in the fast food business. The plaintiff sought to represent approximately 400 past and present Lum's franchisees in a class action. The plaintiff claimed that the franchisees were unlawfully required: (a) to purchase signs and equipment from defendants and to purchase furniture, fixtures, supplies, foods, and beverages from defendants or their approved suppliers; (b) to lease their restaurant sites to defendants who would then sublease the sites back to plaintiffs at the same rental paid by defendants plus 5% of their gross sales and, in some cases, other charges; (c) in some cases to secure their sites from persons designated by Lum's and to deal with building contractors designated by Lum's; and (d) to permit Lum's, upon termination of the franchise agreement, to repurchase equipment and fixtures from them. The claims thus asserted are strikingly similar to those in the case at bar.

While Lum's entered into a franchise agreement for the operation of a Lum's Restaurant with each franchisee, there were some twelve different types of agreements executed from time to time, none of which contained overt tying arrangements. The large variety of forms might have motivated the court to conclude that proof of the tie-ins would have to come from an examination of each franchisee's (or a group of franchisees') dealings with Lum's. However, the opinion denying class certification sweeps far more broadly. Judge King wrote:

> Plaintiffs also urge that the existence of an illegal tying arrangement may be shown not only by evidence of an express agreement but also through conduct extrinsic to an agreement, Advance Business Systems & Supply Co. v. SCM Corp., 415 F. 2d 55 (4th Cir. 1969), cert. denied, 397 U. S. 920, 90 S. Ct. 928, 25 L. Ed. 2d 101 (1970). *In order to establish an illegal tying arrangement arising from business conduct, franchisees must prove that they were coerced, not merely persuaded, into purchasing the products at issue here. See Ford Motor Co. v. United States, 335 U. S. 303, 316-320, 69 S. Ct. 93, 93 L. Ed. 24 (1948).* As the Court stated in American Mfrs. Mutual Ins. Co. v. ABC-Paramount Theatres, 446 F. 2d 1131, 1137 (2d Cir. 1971), cert. denied, 404 U. S. 1063, 92 S. Ct. 737, 30 L. Ed. 2d 752 (1972).
>
> > *"[T]here can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice."*
>
> Such proof will necessarily vary from franchisee to franchisee. If the Abercrombies were to establish that they made forced purchases it would not necessarily follow that other franchisees were similarly coerced. Thus, while the Abercrombies may have purchased equipment from Lum's, it appears that other Lum's franchisees purchased none. Franchisees may have purchased items from defendants for a variety of reasons ranging from convenience, to attractiveness of the product, to, as the Abercrombies claim, coercion. Determination of the issue requires separate, distinct and individual, not common, proof.
>
> Plaintiffs' claims concerning leasing arrangements similarly give rise to individual issues. Any claim that lease provisions which permit cancellation for breach of the franchise agreement could be applied so as to coerce franchisees in the operation of

> their restaurants would necessitate a review of how the provision was administered as to each franchisee who claimed he was coerced thereby. Any claim of a tie-in arising from lease guarantees, which are not mentioned in plaintiffs' franchise agreements, would also require examination of the particular dealings of each franchisee with the defendants.

345 F. Supp. at 391-92 (emphasis added) (footnotes omitted).

Abercrombie was a forceful as well as influential opinion, which is entitled to much respect. However, the context of the present case and matters apparently not called to the attention of Judge King cause us to disagree with his articulation of the individual coercion doctrine. (We do not suggest that *Abercrombie* was incorrectly decided on its facts, which differ markedly from those at bar.) Because of the enormous import of *Abercrombie* on the individual coercion doctrine, it is necessary that we analyze the bases for the opinion in detail and explicate the basis for our disagreement with its salient principles.

As appears from the foregoing text, the first case upon which the individual coercion doctrine of *Abercrombie* is grounded is *Ford Motor Co. v. United States,* 335 U. S. 303 (1948). But *Ford Motor* is not a tying case and, in our view, has no relevance to the issue before the *Abercrombie* court. *Ford* emanated from a consent decree entered into in a previous anti-trust suit between Ford and the government which provided that Ford would be precluded from arranging with specified finance companies that Ford's and their agents would be present with Ford dealers for the purpose of influencing the dealer to patronize that finance company. The decree further prohibited Ford from recommending, endorsing or advertising those finance companies to its dealers or the public and also

from establishing any practice for the financing of autos for the purpose of enabling any finance agency to enjoy a competitive advantage in obtaining a dealer's patronage. Such prohibitions as were contained in the decree were to be suspended unless by a specified date substantially similar prohibitions were placed upon Ford's competitor, General Motors Corportaion (GMC). Negotiations for a consent decree between GMC and the Government failed and criminal charges were thereupon brought against it. In the criminal trial, GMC was found guilty of conduct in violation of Section 1 of the Sherman Act for practices that substantially mirrored those of Ford prior to the entering of the consent decree. Ford appealed and contended that, despite such determination of guilt, the judge's charge in the prosecution of the case involving GMC fell short of holding illegal the conduct proscribed in its consent decree. If such were the case, according to the terms of the consent decree, Ford contended it would be entitled to a suspension of those restrictions not in *pari materia* with those imposed by the criminal adjudication upon GMC.

Accepting the viability of Ford's contention, Mr. Justice Frankfurter, writing for the majority, noted that the trial judge used the word "coercion" to summarize practices which would justify a verdict against GMC. On the other hand, the trial judge used the words "persuasion," "exposition" and "argument" to describe conduct which would be permissible and not supportive of a guilty verdict.[34] Since the consent decree entered into by Ford Motor had made no such distinction and had proscribed

34. The effect of the trial judge's instructions in GMC's criminal case was to "draw a line between such practices as cancellation of a dealer's contract, or refusal to renew it, or discrimination in the shipment of automobiles, as a means of influencing dealers to use GMAC [a finance company], all of which fall within the common understanding of 'coercion,' and other practices for which 'persuasion,' 'exposition' or 'argument' are fair characterizations." 335 U. S. at 316-17.

all the above kinds of practices, the Court simply held that Ford was entitled to a modification of its consent decree to accord with the terms imposed upon GMC by the criminal trial.[35]

It is relevant in determining the extent to which *Ford Motor* supports the individual coercion doctrine to note that the Government in that case urged that the Court should refuse to to suspend or modify the relevant provisions of Ford's consent decree on the grounds that they were, in any event, illegal under the Sherman Act. The Court found this argument unappealing not because practices such as "persuasion" and "exposition" were permissible within the framework of the antitrust laws, but rather on the narrower ground that such position had neither been admitted nor proven. Thus, Justice Frankfurter stated:

> . . . since ascertainment of illegality under the Sherman Law normally depends on the circumstances of a particular situation and the inferences they yield, the appellants have a right to insist that, so long as interdiction of these practices has not been decreed against General Motors, the Government be put to its proof. The lifting of the restraints imposed by the consent decree does not, of course, affect the liability of Ford for any violations of the Sherman Law that the Government may establish in court.

35. Thus, Mr. Justice Frankfurter found:

> The restraints imposed by the paragraphs appellants seek to have suspended are properly described by the terms "exposition," "persuasion" and "argument." So long as these paragraphs remain in effect and so long as there is no comparable decree enjoining their substance against General Motors and GMAC, Ford and CIT cannot do without risk of violating the consent decree that which General Motors and GMAC are free to do. . . . Thus the conditions have been fulfilled which entitled Ford and CIT to suspension of the restraints imposed by those terms of the decree.

335 U. S. at 319-20.

335 U. S. at 320. The foregoing analysis brings to light the weakness of the *Abercrombie* court's reliance upon *Ford Motor* to stand for the proposition that "[i]n order to establish an illegal tying arrangement . . . franchisees must prove that they were coerced, not merely persuaded, into purchasing the [tied] products. . . ." 345 F. Supp. at 391. The Court in *Ford Motor* was concerned purely with a "contract" between the Government and the appellant. The Court's emphasis upon distinctions between "persuasion" and "coercion" was merely a tool of interpretation rather than a substantive explication of the requirements of the antitrust laws.

The second case upon which *Abercrombie* relies is *American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc.*, 446 F. 2d 1131 (2d Cir. 1971), *cert. denied*, 404 U. S. 1063 (1972). That case is likewise inapposite. In *American Manufacturers*, plaintiff, Kemper Insurance Companies (Kemper), claimed that the American Broadcasting Company (ABC) exerted unlawful economic pressure by requiring plaintiff to sponsor an evening news program over several local television broadcasting stations affiliated with the ABC network as a condition to being premitted to sponsor programs over other local ABC affiliates whose sponsorship Kemper desired. The district court dismissed the complaint because of its finding that Kemper did not seriously bargain for the elimination of the alleged unwanted sponsorships; indeed, the court found that Kemper had abandoned its initial attempt to exclude the "unwanted" stations merely due to bargaining strategy. Plaintiff appealed and the decision of the district court was affirmed by the court of appeals. In the opinion of the court of appeals affirming the dismissal, Judge Kaufman noted:

> Here, ABC exerted no pressure on Kemper, successful or not. We agree that it is not decisive, as

> Kemper correctly asserts, that Kemper found the August 15 contract economically advantageous given the available alternatives, since that is a necessary characteristic of most contracts, including illegal ones. But *there can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice.*

446 F. 2d at 1137 (emphasis added).

The *Abercrombie* court focused upon Judge Kaufman's references to "coercion." However, as we read the *American Manufacturers* opinions, the *ratio decidendi* of both the district and circuit courts stemmed from their concern that an antitrust action could be grounded upon what was in actuality a strategic bargaining ploy. While the circuit court used the word "coercion," its real concern was whether there had in fact been any *use of economic* power by the seller. Judge Kaufman continued:

> ABC's initial response was indeed, as might well have been expected, decidedly adverse, but there is no evidence that this reaction ever crystallized into any identifiable or reasonably definitive policy with ABC. . . . Foreclosure implies actual exertion of economic muscle, not a mere statement of bargaining terms which, if they should be enforced by market power, would then incorporate an illegal tie. . . . It is not apparent, to turn the metaphor, that Kemper ever discovered whether it faced a windmill or a bona fide giant. ABC's preliminary bargaining position may have influenced Kemper, but Kemper did not persevere long enough with its ideal lineup to feel any economic pressure from ABC, and we cannot know whether ABC would ever have tried to bring any such pressure to bear.

446 F. 2d at 1135, 1137.

That the use of the word "coercion" in Judge Kaufman's opinion was meant only to refer to utilization of economic power in the tying product is furthered buttressed by his reliance upon the decision in *United States v. Loew's, Inc.,* 371 U. S. 38 (1962). Mr. Justice Goldberg did state in *Loew's* that the "gravamen" of the complaint was the "successful pressure applied to television station customers to accept inferior films." 371 U. S. at 40. However, this aspect of *Loew's,* as we read it, is authority only for the proposition that utilization of economic power is essential to the maintenance of an illegal tie. *Loew's* does not appear to us to suggest that there is an additional requirement of overcoming the will of a buyer faced by the policy decision of a seller not to deal except on terms imposing an illegal tie under the Sherman Act. Nor does *Loew's* seem to imply that where economic pressure is applied, the antitrust result would be any different because the buyer voluntarily accepted the result.

American Manufacturers was also distinguished by Judge McLaren in *McMackin v. Schwinn Bicycle Co.,* 1972 Trade Cas. ¶ 74,220 (N. D. Ill. 1972), *vacated on other grounds,* 1974 Trade Cas. ¶ 75,047 (N. D. Ill. 1974), a recent franchise antitrust suit:

> This Court is persuaded that acceptance of a burdensome tie-in by an appreciable number of buyers within the market permits an inference of coercion and that the decisions in *Fortner* on remand and in *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.* [1971 Trade Cases ¶ 73,659], 446 F. 2d 1131, 1137 (2d Cir. 1971), cert. denied, 404 U. S. 1063 (1972) are distinguishable since there was no consideration of acceptance by an *appreciable* number of buyers in those cases.

1972 Trade Cas. at 93,020.

The other main decision upon which *Abercrombie* relies is *Lah v. Shell Oil Co.*, 50 F. R. D. 198 (S. D. Ohio 1970). *Lah* was a Sherman Act § 1 treble damage action by a Shell Oil dealer against the oil company in which class certification was sought. The plaintiff claimed that Shell conditioned the sale of its gasoline upon the entry by dealers into short term (one year) leases of real estate, *i.e.*, a service station owned by Shell. The plaintiff also claimed that Shell dealers were committed to purchasing further unwanted products such as trading stamps and games. Judge Hogan refused to certify a class in an opinion which does not articulate, but has strong overtones of, the individual coercion doctrine. Because *Lah* is the remaining prop upon which *Abercrombie* rests (other than its own inherent logic with which we will in due course deal), it is important that we analyze *Lah* carefully. When we do, it too appears distinguishable and, with respect to its advancement of the individual coercion doctrine, also unpersuasive precedent.[36]

Judge Hogan's rationale for refusing to certify a class consisting of 140 Shell dealers in southwest Ohio was that the predominating fact of whether Shell refused to sell the plaintiff and other dealers Shell gasoline for sale in stations which they or others owned (or compelled each individual to sign a one-year lease) was "not one question, but 140 separate questions of fact" requiring individual inquiries. 50 F. R. D. at 200. Moreover, the court stated, class actions in the antitrust field are ("with the possible exception of *Chicken Delight*") maintainable where only a single question of fact, such as a conspiracy to fix prices, furnishes the foundation upon which the individual damage claims rest as a matter of course. In terms of the coercion requirement, Judge Hogan also drew upon *Ford Motor Co. v. United States*, 335 U. S. 303 (1948), and *F. T. C. v. Texaco, Inc.*, 393 U. S. 223 (1968). He concluded from those cases that while one in a dominant position may not coerce without running afoul of the antitrust laws, nonetheless the dominant may still persuade or argue. The potential role of company policy was not advanced, and Judge Hogan thus concluded that proof of individual coercion was necessary to establish a Sherman Act claim. The court in *Lah* also found that problems of class action management inherent in the necessity of trying the damage issues individually militated against class certification.

36. As with *Abercrombie*, we do not suggest that *Lah* was wrongly decided on its own facts.

We believe that *Lah* lacked precedential effect in *Abercrombie* and that it lacks it here for several reasons. First, *Ford* is inapposite for reasons noted above. Second, as explained below, *Texaco* does *not* hold that a dominant may persuade; rather, it holds that a dominant may *not* persuade without running afoul of the antitrust laws. While *Texaco* was a § 5 F. T. C. Act case, its holding is buttressed in the Sherman Act § 1 situation by *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134 (1968), in which the Court held that franchisees who had voluntarily, if not eagerly, participated in a tying scheme to their ultimate financial benefit were not barred from seeking treble damages by virtue of the *in pari delicto* doctrine. Furthermore, in terms of the law of class actions, for reasons explained at n. 104 *infra*, we do not agree with the narrow view of their utility in antitrust cases, or that the necessity of individual trial of damage issues inveighs against class action determination.

Abercrombie is not, of course, without its own raison d'être aside from its reliance upon *Ford, American Manufacturers Mutual* and *Lah*. Judge King found that Lum's had a number of franchise agreements in effect from time

to time, materially varying in important respects, and noted that this fact itself led to a proliferation of issues. He also observed that there were serious individual problems of interpretation of 127 general releases given over the course of the operations of Lum's when Lum's bought back franchised stores. Finally, Judge King found that the plaintiffs' personal claims were dissimilar to those of the class. With these conclusions we cannot disagree. But *Abercrombie's* enunciation of the individual coercion doctrine emanates not from these factual phenomena, but rather from reliance upon the cases we believe are inapposite. Furthermore, *Abercrombie* did not focus on the Supreme Court cases, or upon the above-discussed policies underlying the law of tying which we believe are pivotal. Above all, *Abercrombie* did not consider the effect of *Perma Life Mufflers,* which devastates the individual coercion doctrine and which we shall discuss at length below. Hence, we do not elect to follow *Abercrombie.*

It would unduly prolong this extensive opinion to review each of the franchise antitrust cases which have posited the individual coercion doctrine in the wake of *Abercrombie,* and upon which the defendant has relied. We believe it sufficient, with three exception, simply to enumerate them, for they all draw their sustenance from *Abercrombie.* The cases include *Smith v. Denny's Restaurants, Inc.,* 62 F. R. D. 459 (N. D. Cal. 1974); *Halverson v. Convenient Food Mart, Inc.,* No. 70-C-499 (N. D. Ill., Oct. 31, 1974); *Thompson v. T. F. I. Companies, Inc.,* 1974 Trade Cas. ¶ 72,215 (N. D. Ill. 1974); *E. B. E., Inc. v. Dunkin' Donuts of America, Inc.,* C. A. No. 36752 (E. D. Mich., July 24, 1974); *Capital Temporaries, Inc. v. The Olsten Corp.,* 365 F. Supp. 888 (D. Conn. 1973), *aff'd,* 1974 Trade Cas. ¶ 75,303 (2d Cir. 1974); *Bogosian v. Gulf Oil Corp.,* 62 F. R. D. 124 (E. D. Pa. 1973); and *In re*

7-Eleven Franchise Antitrust Litigation, 1972 Trade Cas. ¶ 74,156 (N. D. Cal. 1972).

In *Bogosian* a class certification was sought on behalf of a nationwide class consisting of all present and former retail gasoline service station dealers who leased or had leased their respective stations from any of the 15 defendants, the major nationwide oil companies. The plaintiffs complained that the defendants as landowner-lessors had imposed illegal tie-in agreements in the leasing of their respective service stations by requiring the lessees to buy and sell only the gasoline supplied by their respective lessors, thus preventing them from purchasing their wholesale requirements of gasoline (which they claimed to be a fungible product) on a free and open market. In a well-reasoned opinion, our colleague, Judge Van Artsdalen, (properly, we think) denied class certification. While Judge Van Artsdalen cited *Abercrombie* and the individual coercion doctrine with approval, we believe that *Bogosian* is plainly distinguishable from this case on its facts. In Bogosian, Judge Van Artsdalen was faced with over 400 contractual forms used by the fifteen oil companies; these facts were sufficient to create a predominance of individual issues. Thus, the individual coercion doctrine is not necessary to the *Bogosian* decision. Moreover, a problem existed in determining whether all oil company leased service stations throughout the nation were so strategically located as to be able to create leverage. Additionally, the magnitude of the case created enormous potential problems of management and cast grave doubts upon the superiority of a class action. But equally important to the distinction between *Bogosian* and the present case is the separability of products problem. As Professor McCarthy notes:

> the crucial test is to determine the primary product or products of the franchisor being distributed through franchised outlets. If this is automobiles for car deal-

ers and gasoline for gas stations, then requiring *other* products or services to be bought only from designated sources is correctly characterized as tying. Thus, it was held that General Motors could not force its dealers to use only the services of G. M.'s financing company. However, if General Motors required only that its franchised dealerships sell exclusively G. M. autos, this could not be called a tying of autos to the G. M. trademark, but rather an exclusive dealing arrangement. Similarly, a gasoline refiner might properly require its own brand of gas to be pumped from leased pumps and tanks bearing its trademark, but cannot require a dealer to sell only a designated brand of tires, batteries, and accessories without violating the prohibition against tying.[37]

McCarthy, *supra* note 15, at 1108 (footnotes omitted).

In the district court opinion in *Capital Temporaries,* Judge Blumenfeld adopted the individual coercion doctrine, relying on *American Manufacturers, Abercrombie* and *Belliston v. Texaco, Inc.,* 455 F. 2d 175 (10th Cir. 1972). However, *Capital Temporaries* is also completely distinguishable on its facts since the practices complained of did not even amount to a tying arrangement. It will be recalled from our earlier discussion (see n. 24) that the *Capital Temporaries* plaintiff complained that the blue collar Handy Andy franchise was tied to the purchase of the white collar Olsten's franchise. The evidence showed, however, that neither the contract nor the communications between the parties in any way obligated the franchisee to enter the blue collar business to obtain the white collar franchise; it was purely up to him if he wished to do so. Thus, the court of appeals, in affirming Judge Blumenfeld's grant of summary judgment for the defendant, referred to the plaintiff's allegations as, at best, an "ersatz tie."

37. *But cf. Redd v. Shell Oil Co.,* 1974-2 Trade Cas. ¶ 75,390 (D. Utah 1974).

Finally, in *E. B. E., Inc. v. Dunkin' Donuts,* the court granted summary judgment for Dunkin Donuts, the franchisor involved in the present litigation, because the plaintiff franchisee could not show (individual) coercion. E. B. E., Inc. alleged that an illegal tie-in existed because, as an express condition to obtaining a Dunkin Donuts franchise, E. B. E. was required to purchase all necessary operating equipment from Dunkin Donuts and to rent the building and land from defendant at excessive rates. In surveying the evidence, the court found that the plaintiff was perfectly willing to rely on defendant's services in assembling the business package, and that it had never occurred to him to do otherwise. The court further noted that the plaintiff, instead of claiming that it was forced to accept the equipment, the property lease and signs as a condition of obtaining the franchise, merely argued that it was never affirmatively told that it could buy from other sources. Relying upon *Abercrombie,* the court granted summary judgment for the franchisor because it felt that a plaintiff was required to prove some element of coercion in order to establish an illegal tying agreement. As noted above, we do not follow *Abercrombie.* The court also relied upon *Loew's,* which is inapposite for reasons enumerated above, and upon that portion of *Belliston* dealing with the TBA claim. We believe the *E. B. E.* court's reliance upon *Belliston* to be misplaced.

The *Belliston* court rejected the plaintiff's claim due to the absence from the record of sufficient evidence of coercion. In so doing, the *Belliston* court relied upon the decision in *Atlantic Refining Co. v. F. T. C.,* 381 U. S. 357 (1965), without mentioning that the *Atlantic* coercion test was virtually abandoned in the case of *F. T. C. v. Texaco,*

Inc., 393 U. S. 223 (1968), which followed it. *Belliston* is thus undermined. In sum, we do not find *E. B. E.* distinguishable on its facts since it deals with the same franchisor as the case at bar and with similar allegations. However, for the myriad reasons which form the basis of this opinion, we do not agree with its legal rationale and, therefore, elect not to follow it.

We believe that the foregoing discussion exposes the roots of the individual coercion doctrine and shows them to be frail, if not infirm. But if we have cast doubts upon the viability of the individual coercion doctrine, we have not yet resolved the use-coercion dialogue. Before doing so, it is necessary that we harvest the teachings of *Texaco* and *Perma Life Mufflers.*

D. Texaco *and* Perma Life Mufflers; *Their Adverse Impact Upon the Individual Coercion Doctrine.*

1. *Texaco.*

Federal Trade Commission v. Texaco, Inc., 393 U. S. 223 (1968), was a TBA case addressing the question of whether Texaco had engaged in an "unfair method of competition" under § 5 of the Federal Trade Commission Act when it undertook to induce its service station dealers to purchase the tires, batteries and accessories of B. F. Goodrich. After extensive hearings, the F. T. C. concluded that there was a § 5 violation, but the court of appeals reversed and held that the Commission had failed to establish that Texaco had exercised its dominant economic power over its dealers or that the Texaco-Goodrich arrangement had an adverse effect on competition, 383 F. 2d 942 (D. C. Cir. 1967). The result achieved by the court of appeals was factually inconsistent with that reached by the Supreme Court in *Atlantic Refining Co. v. F. T. C.*, discussed above, and by the court in *Shell Oil Company v. F. T. C.*, 360 F. 2d 470 (5th Cir. 1966). Accordingly, the Supreme Court granted certiorari.

It was agreed before the Supreme Court that the TBA arrangement would fall under the *Atlantic* quasi-tying rationale if the Commission was correct in its three ultimate conclusions: (1) that Texaco had dominant economic power over its dealers; (2) that Texaco exercised that power over its dealers in fulfilling its agreement to promote and sponsor Goodrich products; and (3) that anticompetitive effects resulted from the exercise of that power. The Supreme Court had no difficulty in concluding that the record showed Texaco's dominant economic power over its dealers, and that such power was "inherent in the structure and economics of the petroleum distribution system." 393 U. S. at 226. Mr. Justice Black, speaking for the Court, observed:

> The average dealer is a man of limited means who has what is for him a sizable investment in his station. He stands to lose much if he incurs the ill will of Texaco. As Judge Wisdom wrote in *Shell*, "A man operating a gas station is bound to be overawed by the great corporation that is his supplier, his banker, and his landlord."

393 U. S. at 227. Turning to the manner of the exercise of Texaco's power, Justice Black noted that the evidence before the F. T. C. showed that: (1) Texaco carried out its agreement to promote Goodrich products through constantly reminding its dealers of Texaco's desire that they stock and sell the sponsored Goodrich TBA; (2) Texaco emphasized the importance of TBA and the recommended brands as early as its initial interview with a prospective dealer and repeated its recommendation through a steady flow of campaign materials utilizing Goodrich products;

(3) Texaco salesmen, the primary link between Texaco and the dealers, promoted Goodrich products in their day-to-day contact with the Texaco dealers; (4) the evaluation of a dealer's station by the Texaco salesman was often an important factor in determining whether a dealer's contract or lease with Texaco would be renewed; and (5) Texaco received regular reporting on the amount of sponsored TBA purchased by each dealer. In this regard, the record was palpably weaker than that in *Atlantic Refining* because of the presence there, and the absence in *Texaco,* of overt coercive practices designed to force dealers to purchase the sponsored brand of TBA. The court nonetheless found a § 5 violation:

> While the evidence in the present case fails to establish the kind of overt coercive acts shown in *Atlantic,* we think it clear nonetheless that Texaco's dominant economic power was used in a manner which tended to foreclose competition in the marketing of TBA. *The sales-commission system for marketing TBA is inherently coercive.* A service station dealer whose very livelihood depends upon the continuing good favor of a major oil company is constantly aware of the oil company's desire that he stock and sell the recommended brand of TBA. Through the constant reminder of the Texaco salesman, through demonstration projects and promotional materials, through all of the dealer's contacts with Texaco, he learns the lesson that Texaco wants him to purchase for his station the brand of TBA which pays Texaco 10% on every retail item the dealer buys. With the dealer's supply of gasoline, his lease on his station, and his Texaco identification subject to continuing review, we think it flies in the face of common sense to say, as Texaco asserts, that the dealer is "perfectly free" to reject Texaco's chosen brand of TBA. Equally applicable here is this Court's judgment in *Atlantic* that "[i]t is difficult to escape the conclusion that there would have been little point in paying substantial commissions to oil companies were it not for their ability to exert power over their wholesalers and dealers." 381 U. S., at 376, 85 S. Ct., at 1509.

393 U. S. at 228-29 (emphasis added).

Turning to the effect on competition, and drawing upon the principles familiar in the field of tying law, the Court held that the government did not have to show that a practice which the Commission condemned had totally eliminated competition in the relevant market, but only that the Commission found that the practice in question unfairly burdened competition for a not insubstantial volume of commerce:

> Ideally, each service station dealer would stock the brands of TBA that in his judgment were most favored by customers for price and quality. To the extent that dealers are induced to select the sponsored brand in order to maintain the good favor of the oil company upon which they are dependent, the operation of the competitive market is adversely affected. As we noted in *Atlantic,* the essential anticompetitive vice of such an arrangement is "the utilization of economic power in one market to curtail competition in another."

393 U. S. at 229-30. Accordingly, the Court reversed the decision of the court of appeals and reinstated the Commission's order.

While Texaco is an F. T. C. Act case and thereby requires a lesser standard than under Sherman Act § 1, we believe that its teaching that dominance in bargaining power may give rise to inherent coercion is applicable here.

Texaco does not announce a *per se* doctrine as such; it came to the Court on a voluminous commission record. However, its quasi-tying analysis tracks the traditional tying cases. Much of what had to be proved in *Texaco* must be proved under *Northern Pacific Railway Co. v. United States*, 356 U. S. L (1958), and *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U. S. 495 (1969), *e.g.*, the existence of economic power in the tying product, use of that power and foreclosure of a not insubstantial amount of commerce in the tied product. In terms applicable here, *Texaco* holds that proof of use of economic power in the TBA situation does not require evidence of coercion, but rather that evidence of persuasion or influence will suffice where there is dominance in bargaining power of a franchisor over a franchisee, or, what is essentially the same, where there is evidence of an inherently coercive marketing system. We are satisfied that the same principle applies in the traditional tying situation which is involved here. The importance of this conclusion is that it is a further indication of the unsoundness of the individual coercion doctrine. Moreover, the conclusion may also be relevant here because there appears *prima facie* to be a unique bargaining relationship between the contemporary fast food franchisor and his average franchisee which is similar throughout the typical franchise system; as in the case of *Texaco* and its dealers, "inherent coercion," if it exists, is thus a systemwide, not an individual, matter.[38]

38. In the wake of *Texaco* and the views expressed by Mr. Justice White in *Perma Life Mufflers* with respect to equality of bargaining power (see pp. 68-69 *infra*), it is helpful to keep in mind the fact that the present case does not arise in a vacuum, but rather against the backdrop of a staggering increase in the franchising business in the United States in recent years. According to the *Franchise Opportunities Handbook* published by the United States Department of Commerce in 1972, franchised businesses in the United States accounted for over $131 billion in annual sales in

38. (Cont'd.)

1971, representing 35% of retail sales and 13% of the Gross National Product. Published figures show that 1972 sales in the fast-food franchising industry alone were $5.8 billion dollars. McDonald's led the way with 1.03 billion dollars; Kentucky Fried Chicken's sales were approximately $1 billion and Dunkin Donuts' sales for that year were $120 million. At least 400,000 businessmen are franchisees. FEDERAL TRADE COMMISSION, STAFF REPORT ON LEGAL PROBLEMS IN CONNECTION WITH FRANCHISE AGREEMENTS 6 (1969) [hereinafter cited as FTC STAFF REPORT]. For franchising statistics, see *Hearings on S. 2507 and S. 2321 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., ser. 1, pt. 1 (1967) [hereinafter cited as *Hearings*]. More recent statistics would doubtless reflect significant volume increases.

Franchising has been described as the latest frontier for the independent businessman, a vehicle which enables the "little guy" to enter business despite the trend towards oligopoly which casts a shadow upon the free enterprise system. For an excellent discussion of modern franchising see McCarthy, *supra* note 15, at 1086-1093. Instead of going it alone, a person of modest means desiring to go into business can associate himself with a large concern and market something that is proven, standardized and well advertised. The fact that each franchisee is investing his own money leads to a high degree of motivation for him to work hard to be successful. According to E. Lewis and R. Hancock, THE FRANCHISE METHOD OF DISTRIBUTION 71, n. 2 (1975), most franchisees work long hard hours, often as many as 60 to 80 hours per week. Franchising is also of benefit to the franchisor, who is able to maintain a large number of consumer outlets to distribute his products without having to invest his own money in a retail operation.

Notwithstanding its supposed benefits to the franchisee, it is plain that abuses have appeared which have prompted United States Senate hearings (*see Hearings, supra*) and the enactment of at least one state law to protect franchisees. *See* CAL. CORP. CODE § 31005 (West Supp. 1971). McCarthy describes some of the "inequities of franchising" as follows:

> The franchisee, by definition not wise in the ways of business, is presented with a form contract prepared for the franchisor by a battery of highly skilled attorneys. This contract is usually presented on a take-it-or-leave-it basis, and few of them are negotiated in the legal sense. Relying on the glowing representations of the franchisor's agent, the franchisee readily signs without much perusal of the contract terms. What the terms really mean becomes apparent only after the franchisee launches into the daily operation of his new business.
>
> Most franchise contracts can be legally characterized as a skeleton of a trademark license fleshed out with the many

2. *Perma Life Mufflers.*

The claims of the plaintiffs in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134 (1968), have been detailed at page 23 above. It will be recalled that the plaintiffs complained, *inter alia,* of a supplier tying arrangement, and that the court of appeals held their claims barred by the *in pari delicto* doctrine. It will

38. (Cont'd.)

duties and restrictions imposed upon the franchisee. The failure to comply with any of these terms generally gives the franchisor the power to terminate, often with disastrous results for the franchisee's personal investment. . . .

McCarthy, *supra* note 15, at 1090 (footnotes omitted).

Focusing on the present case and the named plaintiffs involved, we believe that it is fair to conclude that few if any of them, whether represented by counsel or not, had sophistication or resources to match that of Dunkin Donuts in negotiating a new franchise. As the class action discovery in this case demonstrates, today's franchisees come from all walks of life. For instance, before becoming Dunkin Donuts franchisees, the following named plaintiffs pursued the following occupations: Mr. Ungar was an accountant; Mr. Giannuzzi was a butcher; Mr. Cerajewski was a teacher; Mr. Pallantios was a luncheonette operator; Mr. Burwell was a railroad conductor; Mr. Daratony was an automotive designer; Mr. Hudock was a dockman and parttime baker; Mr. Wainrober was a salesman; the Olivieris were beauticians; Mr. Thomae was a barber; and Mr. Rader worked for an electronics company and in a doughnut shop part-time. An affidavit filed by defendant reveals that the franchisee roster also includes individuals who have pursued such diverse occupations as insurance agent, Antarctic scientist, self-employed plasterer, gasoline station operator and ophthalmologist.

Several of the named plaintiffs are multiple franchisees. Pallantios, for instance, operates 9 Dunkin Donuts shops and Rader operates 5. Information supplied to us by counsel for plaintiffs indicates that there may be as many as 95 multi-unit franchisees operating from 2 to 10 stores each. Although it might conceivably create an issue for trial, we suspect preliminarily (and tentatively) that none of the franchisees has as yet reached a position of bargaining equality with Dunkin Donuts. Accordingly, we need not be concerned in this opinion with the import of Justice White's remarks in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134 (1968), respecting equality of bargaining power.

also be recalled that the franchisor there (just as the franchisor here) contended that its Midas Muffler franchisees had voluntarily, if not eagerly, participated in the tying scheme to their ultimate financial benefit. To that contention Mr. Justice Black, speaking for the Court, replied:

> Although petitioners may be subject to some criticism for having taken any part in respondents' allegedly illegal scheme and for eagerly seeking more franchises and more profits, their participation was not voluntary in any meaningful sense. They sought the franchises enthusiastically but they did not actively seek each and every clause of the agreement. Rather, many of the clauses were quite clearly detrimental to their interests, and they alleged that they had continually objected to them. Petitioners apparently accepted many of these restraints solely because their acquiescence was necessary to obtain an otherwise attractive business opportunity. . . .
>
> * * *
>
> Moreover, even if petitioners actually favored and supported some of the other restrictions, they cannot be blamed for seeking to minimize the disadvantages of the agreement once they had been forced to accept its more onerous terms as a condition of doing business. The possible beneficial byproducts of a restriction from a plaintiff's point of view can of course be taken into consideration in computing damages, but once it is shown that the plaintiff did not aggressively support and further the monopolistic scheme as a necessary part and parcel of it, his understandable attempts to make the best of a bad situation should not be a ground for completely denying him the right

> to recover which the antitrust acts give him. We therefore hold that the doctrine of *in pari delicto,* with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action.

392 U. S. at 139, 140. The lessons of the foregoing passage for the present case are obvious; *Perma Life Mufflers* emasculates the individual coercion doctrine.

Also instructive is the concurring opinion of Mr. Justice White, who posed three interesting hypothetical situations. Under the first, a manufacturer (A) sells to a retailer (B) and, over B's objection, insists on adherence to specified retail prices to which B agrees because A's product is important to him and he cannot get it elsewhere. When business declines because of inability to compete, B sues A. Under the second hypothetical, when B maintains the suggested prices on A's product, he simply sells more of C's competing product which he also handles and A sues B. Under the third hypothetical, D and E, competitors, combine to fix higher prices. D's best customer thereupon sets up his own source of supply to D's great damage and D then sues E. Addressing the hypotheticals, Mr. Justice White observed:

> It is arguable that in each supposed situation recovery should be denied because the plaintiff was a party to the illegality and wrongdoers should be left where they are found. In terms of the deterrent aims of the statute permitting injured plaintiffs to recover treble damages, however, this undiscriminating approach makes little sense. *When those with market power and leverage persuade, coerce, or influence others to cooperate in an illegal combination to their damage, allowing recovery to the latter is wholly consistent with the purpose of § 4, since it will deter those most likely to be responsible for organizing forbidden schemes.*[39]

392 U. S. at 145 (emphasis added). It will be noted that Mr. Justice White used the words "persuade," "coerce" and "influence" in the disjunctive, thereby implying that one may violate the antitrust laws by using persuasion or influence without coercion.

Perma Life Mufflers thus goes far beyond *Texaco,* for it makes clear that anticompetitive conduct may exist (and hence be enjoined) in the absence of coercion, even where the franchisees voluntarily acquiesce in the practices which constitute antitrust violations. Even if we read *Perma Life Mufflers* too broadly and conclude that Mr. Justice White's expression more accurately reflects the views of the Court, *Perma Life Mufflers* nonetheless expands upon *Texaco.* This is so because it demonstrates that the use of economic

39. Mr. Justice White reasoned in the first hypothetical case, B should recover from A; that in the second case A should not recover from B; and that in the third case, where D and E were competitors, if judge or jury found the parties equally responsible for the conduct which caused injury, D's recovery under § 4 should be denied for failure of proof that E was the more substantial cause of the injury. Justice White concluded with the observation that:

> No simple formula can encompass the infinite variety of possible situations. Generally speaking, however, I would deny recovery where plaintiff and defendant bear substantially equal responsibility for injury resulting to one of them but permits recovery in favor of the one less responsible where one is more responsible than the other. This rule would simply pose the issue of causation in particularized form. There will be little mystery as to what evidence would be relevant proof: facts as to the relative responsibility for originating, negotiating, and implementing the scheme; evidence as to who might reasonably have been expected to benefit from the provision or conduct making the scheme illegal under § 1; proof of whether one party attempted to terminate the arangement and encountered resistance or counter-measures from the other; facts showing who ultimately profited or suffered from the arrangement.

392 U. S. at 146-47.

power is inferable in a situation where there is a dominant relationship of franchisor over franchisee,[40] and where the franchisor's conduct rises not to the level of coercion, but only to the level of persuasion or influence.

E. *Can There be a "Voluntary" Tie(?); Further Defects in the Individual Coercion Doctrine.*

The thrust of the individual coercion doctrine is that the plaintiffs must prove that each of them did not take the tied product willingly. The advocates of the doctrine do not explain whether the willingness standard is a subjective one, depending upon the state of mind of each franchisee. Is individual coercion proved if the franchisee took the tied product "willingly" but with strong mental reservations? Or is individual coercion proved only where there were active negotiations over the subject of the tie and the franchisee took it "or else?" Put conversely, is individual coercion negated only if the franchisee truly desired the package of the tied product along with the tying product? And must the buyer have had conscious knowledge of the uneconomic nature of the package before there can be proof that he took the package without being coerced? Dunkin Donuts opts for a construction in the harshest light to plaintiffs, *i.e.*, to bar each plaintiff from a cause of action unless each can show that he bargained to reject each specific tied product and capitulated by taking each tied product due to improper economic pressure.

We reiterate these queries because they help to frame the critical issue of whether there can be a "voluntary" tie. We conclude that there can be an antitrust violation where the franchisee takes voluntarily and with knowledge of the

40. See n. 38 *supra*.

uneconomic nature of the tie.[41] Moreover, we believe this to be the case whether or not the franchisee possessed mental reservations (although the case for a tie is stronger if he did have reservations). *Northern Pacific Railway Co. v. United States*, 356 U. S. 1 (1958) and *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U. S. 495 (1969), with their emphasis on the free market and the non-foreclosure of competition, point to this conclusion; *Perma Life Mufflers*, with its rejection of the *in pari delicto* defense, compels it. An additional basis for rejection of the individual coercion doctrine is the almost metaphysical analysis which would be required if we were to adopt it; courts would be obliged to parse the human personality in the most sophisticated terms in an effort to determine the franchisee's state of mind vis-a-vis the putative (and ill-defined) coercion standard.

Finally, it should be noted that the Court in *Northern Pacific* defined a tie as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least *agrees* that he will not purchase that product from any other supplier." 356 U. S. at 5-6 (footnote omitted) (emphasis added). The use of the word "agreement," moreover, has been prevalent in other tying cases decided by the Supreme Court. *See Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U. S. 495 (1969); *Times-Picayune Publishing Co. v. United States*, 345 U. S. 594 (1953). Thus, a further argument against the individual coercion doctrine can be constructed on a linguistic basis.

The dictionary definition of the word "agreement" is "harmony of opinion, action, or character; concord." Such language, although far from determinative, would seem

41. The willing but ignorant buyer must be deemed indirectly and subjectively coerced since, in the defendant's parlance, a rational man would presumably not take an uneconomic tie unless he was coerced or deceived.

itself to point to a less strenuous requirement than that of coercion in order to make out a violation of the antitrust laws. Thus, although one could conclude that the use of the word "agreement" is either loose language on the part of the Court or only an indication of the final "forced deal" which is entered into between buyer and seller, one could just as easily conclude that such is not the case. In light of the policy behind the proscription of ties--that they harm both the buyers who may be unwilling to take the tied product as well as competitors of the sellers of the tied product from entering a new market—plus the inadvisability of attributing "loose language" to the Supreme Court, it would seem preferable to take the word "agreement" at face value and dispense with any notions of individual coercion.

F. *The Role of Company Policy in Proving Use of Economic Power.*

The individual coercion cases have generally held that where there is no *Siegel*-type standard form franchise agreement that can be the focal point of allegedly illegal acts, proof of tie-ins has to come from an examination of each individual franchisee's dealings with the franchisor which becomes a matter of individual proof militating against class certification. The analysis in the preceding sections of this opinion explains our disagreement with this view. Moreover, for the reasons outlined in § IV B above (commenting upon incipient flaws in the individual coercion doctrine evident from an analysis of *Siegel II*), we conclude that proof of a resolutely enforced company policy to dissuade the franchisee from purchasing other than from or through the franchisor is the equivalent of an express contractual tie. It should indeed make no difference whether a tie is articulated in the contract or can be

proved at trial as having been imposed *sub silentio* through a pervasive and resolutely enforced company policy. To hold to the contrary would be to exalt form over substance.

The efficacy of this proposition was recognized by Judge Reynolds in his decision in *In re Clark Oil & Refining Corp.*, 1974-1 Trade Cas. ¶ 74,880 (E. D. Wis. 1974). *Clark* comprised two consolidated actions brought on behalf of 1800 Clark Oil dealers and 1000 former dealers against their branded supplier asserting price fixing, price discrimination and tying claims. While Judge Reynolds' short opinion does not recite the underlying facts, we have reviewed the briefs from which it appears that the tying complaints were a combination of the claims asserted in *Bogosian* and in the TBA cases; that is, the Clark dealers objected to dealing exclusively in Clark products and to being required to purchase unwanted products. Clark's brief in opposition to plaintiffs' motion for determination of a class cited *Bogosian v. Gulf Oil Corp.*, 62 F. R. D. 124 (E. D. Pa. 1973); *Abercrombie v. Lum's Inc.*, 345 F. Supp. 387 (S. D. Fla. 1972); *Lah v. Shell Oil Co.*, 50 F. R. D. 198 (S. D. Ohio 1970); and *In re 7-Eleven Franchise Antitrust Litigation*, 1972 Trade Cas. ¶ 74,156 (N. D. Cal. 1972), in support of Clark's allegation that the individual coercion doctrine insulated it against class certification. Judge Reynolds nonetheless made a (conditional) class certification. Confirming, and to some extent placing a synergistic gloss upon, the point at hand, he stated:

> Individual acts of coercion may be just that—isolated incidents with no implications beyond the specific individuals being coerced—or they may be part of an overall pattern which has a coercive impact beyond the particular parties involved. Coercive activities aimed at one dealer for engaging in some specific behavior can, under some circumstances, have the obvi-

ous effect of coercing all dealers from engaging in similar behavior.

We agree.[42]

G. *The Use-Coercion Dialogue Synthesized.*

The lengthy analysis of the individual coercion doctrine in the preceeding pages makes it plain that that doctrine lies within the conceptual framework of the segment of the law of tying which requires proof of the nexus between economic power in the tying product and the restraint of competition in the tied product, or, put differently, the requirement that economic power be used in the tying transaction. We resolve the duality between use and coercion as follows.

Our first conclusion has already been drawn. It is that the individual coercion doctrine is not properly a part

42. Company policy may be reflected in similar representations or misrepresentations to all purchasers. It is thus appropriate to note here the words of Judge Harris in making the original class certification in *Siegel I:*

> To acknowledge defendants' position at this point would be, in effect, an emasculation of the vitality and pliability of the amended rule, as recognized by Judge Edmund Palmieri when he stated that "While there may be different kinds of misrepresentations alleged with respect to different plaintiffs, including some oral misrepresentations, and while such factors might have led to dismissal of a class action under the old rule, e.g., Speed v. Transamerica Corp., 5 F. R. D. 56 (D. Del. 1945); Gilbert v. Clark, 13 F. R. D. 498 (D. Mass. 1952), the new Rule 23 provides the flexibility to permit this action to proceed. *It may very well develop that the misrepresentations made to the purchasers were in fact very similar, if not identical.* If, on the other hand, the facts should reveal in the course of the pre-trial development of the case that the alleged misrepresentations were so varied as to render the action unmanageable (Fed. R. Civ. P. 23(c)(1), the Court can order that the class allegations be stricken and that the action proceed on behalf of the named plaintiffs alone. Fed. R. Civ. P. 23(c)(1), and 23(d)(4)." Kronenberg v. Hotel Governor Clinton, Inc., 41 F. R. D. 42, 45 (S. D. N. Y. 1966).

271 F. Supp. at 727 (emphasis added).

of tying law. It is not necessary to prove coercion in order to establish an illegal tie; concomitantly, there can indeed by a "voluntary," yet illegal, tie. When a franchisee with or without knowledge of the uneconomic nature of the tie, and with or without bargaining or even arguing on the point, takes a tied package voluntarily, he can still seek relief so long as it is shown that the franchisor possessed the requisite economic power or leverage and, in fact, used or exercised it to induce the franchisee to take the tied product. The franchisee has not been coerced in this circumstance; his will has not been overcome. Yet, *Perma Life Mufflers* compels the conclusions that: (1) the plaintiffs are not barred because they cannot prove coercion; and (2) it does not matter if the franchisee truly desired the package of the tied product along with the tying product because he was new to the fast food business and was willing to pay more for a total deal. This is particularly so in view of the emphasis of *Fortner* and *Perma Life Mufflers* on the non-foreclosure of competition. Moreover, even if we read *Perma Life Mufflers* too broadly, it is plain under *Texaco* and Mr. Justice White's views in *Perma Life Mufflers* that where there is unequal bargaining power, it is not necessary to prove coercion; mere persuasion or influence will suffice.

A contrary result is not compelled by *Siegel II*. As we have seen, *Siegel* did not require proof of individual coercion. When the post-*Siegel* cases arose, the courts often stated that where there was an express contractual tie, coercion was "presumed."[43] But it was not coercion that was *sub silentio* presumed in *Siegel II;* it was the *use of economic power.*

The second conclusion that we draw is that the principal significance of the coercion notion in this area is as

43. *See, e.g., Smith v. Denny's Restaurant's, Inc.,* 62 F. R. D. 459 (N. D. Cal. 1974).

one mode of proving use of economic power. If a franchisor who possesses the requisite economic power coerces the franchisee in such a manner as to restrain competition in the tied product, *a fortiori* he has used his economic power. This, then, establishes the necessary nexus between economic power in the tying product and the restraint of competition in the tied product. Since *Siegel II,* however, there has been a subtle process by which coercion, as a mode of proving use of economic power, has itself been construed to be the required nexus between the economic power and restraint of competition requirements. The metamorphosis has been aided by what we have submitted is a misuse of the *Ford Motor, Texaco* and *Lah* precedents, and by what we believe to be an imprecise use of language. The term "coercion" has been used differently in different cases, sometimes in the strict sense posited by defendant, and sometimes to connote mere use of economic power or mere persuasion or influence. In his famous article, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,* 23 Yale L. J. 16 (1913), Professor W. N. Hohfeld observed: "in any closely reasoned problem, whether legal or non-legal, chameleon hued words are a peril both to clear thought and lucid expression." That observation is in order here.

The second conclusion just recited leads readily to a third, which is that proof of individual coercion is but one of several means of establishing the use of economic power or leverage. We agree with defendant that the individual coercion mode of proof of use is inapplicable in a class context. For purposes of this opinion, we will address only those modes which lend themselves to class treatment. This observation brings us to our final conclusion, relating to how use of economic power may be proved in a class context.

First we find that use of economic power may be established by evidence of a firm and resolutely enforced company policy to influence the franchisees to purchase from the franchisor or its designated sources. As will be seen in our survey of the class action discovery, plaintiffs contend that there is at least prima facie evidence of such a company policy in the areas of the equipment, sign, real estate and supply tie-ins.[44] If such a policy is established, individual exceptions make no difference. It is not necessary, in the wake of *Perma Life Mufflers,* that the company policy be administered coercively. If, however, we read thta case too broadly, *Texaco* at least establishes that persuasion or influence may be the virtual equivalent of coercion where there is an unequal relationship between the parties, as there is here. *Cf.* White, J., concurring in *Perma Life Mufflers.*

We also believe that use of economic power is inferable from the acceptance by large numbers of buyers of a burdensome or uneconomic tie. In any event, such evidence would be probative. In this respect we note that,

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44. Although the parties have not addressed the issue, we perceive in the facts as developed during class action discovery possible instances where the necessity of taking the tied product did not appear until after the franchise sale was completed. In our view, this does not inveigh against a tying claim with respect to such instances if the situation resulted from company policy or where a threat of franchise termination existed for failure to comply. We note that the plaintiffs allege that Dunkin Donuts possesses broad termination leverage under the franchise agreement. There is at least one case holding that temporal notions must give way to reality. *See MCA Data Centers, Inc. v. International Business Machines Corp.,* 342 F. Supp. 502 (E. D. Pa. 1972), where Judge Masterson rejected the argument that no tie-in claim could be asserted because there was no mention of any service requirement (the alleged tied product) until after the IBM computers had been delivered and installed. Judge Masterson held that supplying an inoperable product which becomes useful only upon acceptance of another product or service can constitute an unlawful tie-in.

in *McMackin v. Schwinn Bicycle Co.*, 1972 Trade Cas. ¶ 74,220 (N. D. Ill. 1972), *vacated on other ground*, 1974 Trade Cas. ¶ 75,047 (N. D. Ill. 1974), Judge McLaren was persuaded that acceptance of a burdensome tie-in by an appreciable number of buyers permits an inference of coercion.[45] It is also instructive to recall Professor Turner's observation:

> Since a tying arrangement in the vast majority of cases performs no useful function that cannot be performed by less restrictive courses of action, it is quite reasonable to presume an illegal purpose . . . from the mere fact that the tie-ins were used.

Turner, *supra* note 15, at 64. In positing this mode, we are not unaware that, in an ultimate sense, acceptance by large numbers of buyers of a burdensome or uneconomic tie may be nothing more than the mirror image of a company policy to effect illegal ties.

We thus resolve the use-coercion dialogue by rejecting the doctrine that individual coercion must be proved in order to establish an unlawful tie. We conclude that the required use of economic power may also be established by proof of a resolutely enforced company policy to persuade or influence franchisees to buy only from the franchisor or its designated sources, particularly (but in any event) where there is an unequal bargaining relationship between the parties, or by proof that large numbers of franchisees have accepted a burdensome or uneconomic tie.

As is evident from the foregoing discussion, we have not presented a formulation with the precision of a jury charge. Nor have we attempted to posit the quantum of evidence required before the case can go to the jury. What

45. Judge McLaren also states therein that coercion is not a necessary element of a Sherman Act § 1 action.

we have done is to state our general conclusions as to the law in this area, for only in that way can we assess the nature of the issues to be tried. That assessment is, we believe, a precondition to addressing the question of certification of a class.

V. Defenses to a Claim of Tying.

The record in this case reflects the interposition by Dunkin Donuts of certain defenses to plaintiffs' claims of tying. Because these defenses present bona fide issues for trial, we must review the applicable law so as to be able to determine whether trial of those defenses presents issues in which common or individual questions predominate. The principal defense at issue is the marketing identity or quality control defense, but for the sake of completeness we shall also mention other possible defenses.

A. *The Marketing Identity or Quality Control Defense.*

The most frequently asserted defense in franchise tying cases is the marketing identity or quality control defense.[46] In essence, the defense asserts that a form of tying clause is necessary for the franchisor to preserve the value of his trademark by ensuring that uniform appearance and quality are maintained at all franchised outlets. Plainly it is uniformity of product which causes the public to patronize given franchised stores. Indeed, trademark law imposes an affirmative duty upon a trademark owner to the public to maintain control over the quality of the products sold by his licensees under his trademark at the peril of abandonment of the mark. *See* 15 U. S. C. § 1055, 1127 (1958). The history of the defense has been ably traced by Professor McCarthy in his article *Trademark Franchising and Antitrust: The Trouble with Tie-ins,* 58 Calif. L. Rev. 1085, 1110-1116 (1970); *see also* Comment, *Quality Control and the Antitrust Laws in Trademark*

46. In *Siegel II* this defense was labelled the "marketing identity" justification.

Licensing, 72 Yale L. J. 1171 (1963); and *Siegel II,* 448 F. 2d 43, 51-52 (9th Cir. 1971), *cert. denied,* 405 U. S. 955 (1972). The Supreme Court has approved the defense but has restricted its availability. *See Standard Oil Co. v. United States,* 337 U. S. 293 (1949); *International Salt Co. v. United States,* 332 U. S. 392 (1947); *International Business Machines Corp. v. United States,* 298 U. S. 131 (1936).

The general principle which has emerged, representing the courts' efforts to reconcile the conflicting pulls of the law of trademarks and the law of antitrust, is that a restraint of trade can be justified only in the absence of less restrictive alternatives such as meaningful specifications for the tied product. In *Standard Oil Co. v. United States,* it was held:

> The only situation, indeed, in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied.

337 U. S. at 306. The franchisor has the burden of proving that it would be impractical to draft quality specifications and allow franchisees to buy their needed supplies anywhere in the market.

The quality control defense is a hotly contested issue in this litigation and more will be said of it later. We have noted already the plaintiffs' contention that the approved supplier clause in the Dunkin Donuts franchise agreement is a subterfuge for a kickback scheme. The defendant emphatically denies this contention and presses forcefully the necessity for quality control.[47] The defense may well

47. Indeed, defendant points to the Consent Order in *In re AAMCO Automatic Transmission, Inc.,* F. T. C. File No. 681 0141, reported at 1972 CCH FTC Complaints ¶ 20,094, where the Federal Trade Commission entered a Consent Order *instituting* an approved supplier system for AAMCO franchisees' purchases of automotive parts, equipment and merchandise.

prove to be a successful one. However, in terms of the settled principles of the law of tying, it is plain that one cannot immunize a tie-in from antitrust scrutiny merely by stamping a trademark symbol on the tied product—at least where the tied product is not itself the product represented by the mark.[48]

B. *Other Defenses.*

The remaining defenses to tying are principally the collection of royalty defense[49] and the new business justi-

48. Professor McCarthy takes a strong stand on the issue:

> But when does quality control justify tying supply sources to the licensed trademark? The answer is: hardly ever. Effective quality control in no way requires trademark owners to designate their franchisees' suppliers. Both antitrust law and trademark law are satisfied by the simple alternative of quality specifications that allow the franchisee to buy from whomever he chooses, so long as he meets the quality standards. The only possible exception is the rare case where it is impossible to draft meaningful specifications for quality.
>
> The quality specification alternative will, of course, put a greater burden on the franchisor than if he could simply designate sources and supervise quality at the supply source. But mere convenience has never been a defense to charges of restraint of trade. Congress and the courts have decided that the benefits of competition are worth the price of inconvenience and extra expense. The social and economic benefits of allowing the franchisee freedom of choice are worth the price of greater burdens on the franchisor in achieving quality control: "[The] central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act [is] against contracts which take away freedom of purchasers to buy in an open market."
>
> The franchisor who ties franchisees into designated supply sources merely to get a kick-back on sales to his franchisees is deserving of little sympathy: he is merely trying to deceive them as to the true extent of their royalty payments.

McCarthy, *supra* note 15, at 1117-1118 (footnotes omitted).

49. In *Siegel II,* the court held that a tie-in cannot be justified as an accounting device for compensation for a trademark license.

fication.[50] Professor Austin has also referred to the "defense of lenient enforcement," Austin, *supra* note 15, at 121, the core of which is that competition is not restrained or lessened where there is lax enforcement of the tying clause. Professor Austin observes, however, that this is the "least successful defense," and that the courts have looked to the omnipresence of the power to foreclose and not to the degree of actual enforcement. It does not appear that any defense other than the quality control defense will be important in the case at bar.

50. The new business justification stems from the decision of Judge Van Dusen in *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E. D. Pa. 1960), *aff'd per curiam*, 365 U. S. 567 (1961). Jerrold was a pioneer in the business of selling systems of electronic equipment to relay television to rural areas where TV signals could not be effectively received with conventional apparatus. It sold its equipment only on the condition that the buyers agreed to accept an installation and servicing contract. The court noted that the company, which was the pioneer in the industry, had sold approximately 75% of the CATV systems in the country. The court also noted that the community television system industry in the country might have been retarded or destroyed by consumer reaction to a rash of early system failures, and that Jerrold lacked the resources to survive initial setbacks. It found that the tie-ins were necessary to prevent system failures in light of the intricacy of the new system and the training necessary for proper servicing, which made it impossible for Jerrold to prevent failures by supplying purchasers with instructions alone.

Judge Van Dusen evaluated the tying agreements dealing with maintenance and repair services under § 1 of the Sherman Act and the agreements covering purchases of replacement parts and full systems under Section 3 of the Clayton Act. He held that even though the tied service agreements constituted a *per se* violation under *Northern Pacific*, under the unique facts of the case an injustice would be done by blindly accepting the *per se* rule. He thereupon fashioned a limited exception where the tie was necessary to preserve and enhance the goodwill of a new and small industry. Moreover, Judge Van Dusen held that the defendant had the burden of proof as to the exception. While *Jerrold* has frequently been cited as an exception to the *per se* rule and interpreted as an effort to establish a "rule of reason" in tying cases, which would in turn necessitate exhaustive economic inquiry in every tying case, it is in actuality a very discrete exception applying only to new and small industries. *See generally* Comment, *The Use of Tie-Ins in New Industries*, 70 Yale L. J. 804 (1961).

VI. Antitrust Law and Restrictive Covenants.

As mentioned earlier in the section delineating plaintiffs' claims, the franchisees seek class certification of their prayer for a declaratory judgment that the defendant's franchise agreements contain restrictive covenant clauses which are invalid under the common law and § 1 of the Sherman Act.

We have already described the in-term and post-term restrictive covenants imposed by Dunkin Donuts in its franchise agreement. In broad general terms, the Dunkin Donuts restraints are similar to those customarily impos[illegible] in this country upon employees or sellers of businesses, proscribing them from working for a competitor or setting up a competitive business within a designated geographical limit and period of time. Ineed, the antecedents of such typical restraints are so hoary that the commentators report judicial scrutiny under the "restraint of trade" rubric for more than five hunder years.[51] Today, although many diverse formulations and applications may be found to exist from state to state (see discussion, *infra*), it can be said generally that a restrictive covenant is unreasonable and therefore illegal under state law if it "(a) is greater than is required for the protection of the person for whose benefit the restraint is imposed, or (b) imposes undue hardship upon the person restricted, or (c) tends to create,

51. The first case involving a restrictive covenant that has come to our attention is *Dyer's Case*, Y. B. Mich. 2 Hen. 5, f. 5, pl. 26 (C. P. 1414). However, the most celebrated decision on the legality of common-law restraints came almost three hundred years later in *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (Q. B. 1711). There the court balanced the social utility of certain types of restraints against their possible deleterious effects upon the promisor and the public, formulating a test of "reasonableness" under which such undertakings were to be examined. This approach has carried forward to the present day, albeit somewhat modified in form. For an excellent discussion of the common law antecedents of the principles governing the legality of restrictive covenants, see Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625 (1960).

or has for its purpose to create, a monopoly, or to control prices or to limit production artificially." RESTATEMENT OF CONTRACTS § 515 (1932).[52] Courts look to the geographical scope, length of time of the restriction, and breadth of its prohibitions in applying the Restatement's formulation in a given factual situation.

The federal antitrust laws, with rare exceptions, have not been applied to restrictive covenants. *See* Goldschmid, *Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants under Federal Law*, 73 COLUM. L. REV. 1193 (1973). *See also* Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 628 (1960). Thus, although section 1 of the Sherman Act makes illegal "every contract, combination . . . or conspiracy, in restraint of trade or commerce. . . .", and although in the first decades after the act's passage the common law "restraint of trade" doctrine was considered the major guide to determining the meaning of the statutory phrase, the modern day treatment of these "ancillary" restraints has been overwhelmingly a function of state and not federal law.[53]

According to Professor Goldschmid, there is little legal basis for this state of affairs since certainly "[t]here is no doubt that the Sherman Act was intended to apply to those restraints that were unenforceable at common

52. This is an abbreviation of the Restatement's more detailed formulation which lists some additional factors not mentioned herein. However, the above test is the one most often utilized by the courts who have reduced the standards to just three.

53. *See, e.g., Capital Temporaries, Inc. v. The Olsten Corp.*, 1974-2 Trade Cas. ¶ 75,303 (2d Cir. 1974); *Bradford v. New York Times Co.*, 1974-2 Trade Cas. ¶ 75,149 (2d Cir. 1974); *Water Services, Inc. v. Tesco Chemicals, Inc.*, 410 F. 2d 163, 167 n. 4 (5th Cir. 1969). The position expressed by the courts in these decisions is that restrictive covenants do not rise to the status of Sherman Act violations and that they are generally treated under state law.

law."[54] 73 COLUM. L. REV. at 1204. Moreover, since restrictive covenants can well be construed as "contracts" within the meaning of the Sherman Act, apart from any "combination" or "conspiracy" theories that may apply in any given case, antitrust application is seemingly well warranted. Precedent for such application has emerged in this circuit in the case of ***American Motor Inns, Inc. v. Holiday Inns, Inc.***, 365 F. Supp. 1073 (D. N. J. 1973) [hereinafter "AMI"].[55]

54. To support this conclusion, Professor Goldschmid quotes the famous opinion of Judge Taft (later Chief Justice) in *United States v. Addyston Pipe and Steel Co.*, 85 F. 271, 279 (6th Cir. 1898), *aff'd*, 175 U. S. 211 (1899), to the effect that the design of the Sherman Act was only to alter the legal consequences of improper contracts:

> The effect of the act of 1890 is to render such contracts unlawful in an affirmative or positive sense, and punishable as a misdemeanor, and to create a right of civil action for damages in favor of those injured thereby, and a civil remedy by injunction in favor of both private persons and the public against the execution of such contracts and the maintenance of such trade restraints.

Moreover, the author points to Chief Justice White's summation of the common law from *Mitchel v. Reynolds* in *Standard Oil Co. v. United States*, 221 U. S. 1, 59 (1911):

> Let us consider the language of the first and second sections [of the Sherman Act], guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense. . . .
>
> . . .
>
> . . . [T]he context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade. . . .

73 COLUM. L. REV. at 1205.

55. *AMI* is the only decision which, to our knowledge, has determined the legality of a restrictive covenant under the antitrust laws, although there are other cases which approach the analysis utilized in *AMI* tangentially. *See Hecht v. Pro-Football, Inc.*, 444 F. 2d 931 (D. C. Cir. 1971), *cert. denied*, 404 U. S. 1047 (1972); *United States v. Chicago Tribune–New York News Syndicate, Inc.*, 309 F. Supp. 1301 (S. D. N. Y. 1970).

AMI was a "multiple franchisee," owning or operating 48 Holiday Inns in Tennessee, North Carolina, Virginia, Maryland, Pennsylvania, Connecticut, Maine, Massachusetts and Puerto Rico. The case, dealing with violations of the Sherman Act, stemmed from AMI's unsuccessful efforts to obtain a Holiday Inn franchise for land which it owned near the Newark airport at Elizabeth, New Jersey, and its consequent desire to construct an inn on that property in affiliation with the Sheraton chain. In granting the plaintiffs relief, Judge Garth held that: (1) Holiday Inns' "radius letter" policy, whereby existing franchisees in the vicinity of locations for which new franchise applications were made were given the opportunity to object to the proposed granting of the new application and a "veto of sorts," constituted a conspiracy to allocate territories horizontally which was a *per se* violation of the Sherman Act;[56] (2) Holiday Inns' unilateral policy of not granting franchises in cities where it operated inns itself was not, by itself, violative of the Sherman Act because it was not the result of a "contract,"

56. In its market effects and manner of operation, Judge Garth determined that Holiday Inns' radius letter policy was closely analogous to the horizontal allocation of territories condemned in *United States v. Topco Associates*, 405 U. S. 596 (1972). In *Topco*, 25 small supermarket chains formed a wholly-owned cooperative association ("Topco Associates") to serve as a purchasing agent for its members and to distribute Topco-brand products. Applications for membership in the cooperative went through approval procedures of the Board of Directors and of 75% of the existing members. If the closest existing member, or any member within 100 miles of the applicant, voted against approval, however, then an 80% vote was required. The Supreme Court held the Topco system illegal *per se* because these practices operated as "a veto of sorts" over actual and potential intra-brand competition. Although the individual Holiday Inns did not combine to create and own Holiday Inns, Inc., as the Topco franchisees created and owned Topco Associates, Judge Garth found that through the radius letter technique Holiday Inns franchisees had utilized the parent Holiday Inns, Inc. as the Topco franchisees utilized the "parent" Topco Associates—to allocate territories horizontally.

"combination" or "conspiracy;" and (3) (the holding relevant here), the clause of the franchise agreement prohibiting a franchisee from owning or being involved in the operation of any inn, hotel or motel other than one franchised by Holiday Inns (the non-Holiday Inn clause) constituted an unreasonable restraint of trade violative of Section 1 of the Sherman Act.[57]

The non-Holiday Inn clause was nationwide (or perhaps worldwide) in scope.[58] In determining that the clause violated the rule of reason under Section 1 of the Sherman Act, Judge Garth examined the business justifications for the restraint, the practices generally obtaining in the industry and the harm flowing from the restrictive covenant. Finding the practices of others in the industry to be less restrictive while still protective of their legitimate interests, and the business justifications advanced by Holiday Inns insufficient to warrant judicial approval of such a drastic and unnecessary restraint of trade, Judge Garth concluded:

> The harm flowing from the non-Holiday Inn clause is the foreclosure of all hostelers competing with HI from doing business with all HI franchisees. . . . By the same token, the non-Holiday Inn clause precludes AMI from owning, for example, a Sheraton Inn in competition with a franchised or company-

57. Judge Garth also held that regardless of the market effect of the above practices standing alone, their combined effect resulted in a horizontal allocation of territories violative of the antitrust laws because such practices cumulatively insulated any given Holiday Inn from unwanted competition from any other Holiday Inn or from any non-Holiday Inn owned by a Holiday Inns franchisee.

58. The non-Holiday Inn clause provided:

> . . . that licensee will not, directly or indirectly, own any interest in, operate, or be in any manner connected with or associated with, any inn, hotel or motel, during the period of this license, except Holiday Inns.

365 F. Supp. at 1081.

owned Holiday Inn, even at a site distant from those sites at which AMI has Holiday Inns. . . .

365 F. Supp. at 1094.

The defendant in *AMI* argued, much as it does in the instant action, that the restrictive covenant creates an exclusive dealing type arrangement which is justified prima facie unless it results in anticompetitive effects more substantial than those discussed above. Assuming, *arguendo*, that the non-Holiday Inn clause did create an exclusive dealing situation, Judge Garth held that it would still violate Section 1 of the Sherman Act. Setting forth the guidelines to be followed in exclusive dealing cases as: (1) defining the line of commerce; (2) charting the area of effective competition in the known line of commerce; and (3) finding foreclosure of a substantial share of the relevant market, Judge Garth held that the line of commerce therein involved was hotel-motel chains utilizing national referral systems, and that the area of effective competition among national hostelers for hotel-motel outlets was the United States.[59] Finding that the independent Holiday Inns franchises comprised 14.7% of the hotel-motel chains utilizing national referral systems in the United States and that those same franchisees were the ones prevented from affiliating with the national hotel-motel chains that competed with Holiday Inns, Judge Garth concluded that the percentage of the relevant market foreclosed was 14.7%. He then held that this foreclosure was substantial enough

59. One reason for selecting this market definition of the line of commerce was that it took into account the national referral system, a device which is important to Holiday Inns' success and whose protection was the alleged justification for the restrictive covenant. Moreover, in selecting the geographic market, Judge Garth found that AMI owned or had applied for franchises in the entire United States except for the Far West, and had been unable to deal with other hotel chains operating nationally. Also, he cited evidence that another Holiday Inns franchisee, Albert Pick, had been precluded by Holiday Inns from maintaining his own independent chain of non-Holiday Inns.

to satisfy the Supreme Court's pronouncements in *Tampa Electric Co. v. Nashville Co.*, 365 U. S. 320 (1961), and *Standard Oil Co. v. United States*, 337 U. S. 293 (1949). The restrictive covenant which prevented franchisees from owning non-Holiday Inns was, thus, for this additional reason, an illegal "restraint of trade" violative of the antitrust laws.

The foregoing discussion makes it plain that Judge Garth did not apply a *per se* test to the restrictive covenant at issue. Under the antitrust laws, this restraint must be evaluated on a factual basis under the rule of reason test. In our class action discussion *infra*, we will address the certifiability of the plaintiffs' assertion that the nationwide (or worldwide) in-term restraint in the Dunkin Donuts standard form franchise agreement is violative of § 1 of the Sherman Act under the rule of reason analysis or under an alternative exclusive dealing analysis. In the latter connection, we will perforce consider the process by which the relevant market (nationwide or less (?)—for donut shops or all fast food franchises (?)) may be proved. Suffice it to say here that, following the lead of the *AMI* case rather than the cases cited at n. 53 *supra*, we believe that the matter of Dunkin Donuts' nationwide (or worldwide) in-term restraint is a bona fide antitrust issue.

VII. A Survey of the Class Action Discovery.

A. *Introduction; Overview of Defendant's Position.*

When class action motions were filed we ordered that discovery be taken, limited to the class action issues, so that we would have a sufficient factual record to survey before making findings regarding determination of the class. Extensive discovery was, indeed, undertaken. Voluminous corporate records were produced by Dunkin Donuts and records of the plaintiffs were also produced. The parties deposed included all the named plaintiffs and

the main corporate officers, franchise salesmen and zone managers of defendant.

At an earlier stage of this opinion, we described the plaintiffs' antitrust and common law claims. Hence, our review of the class action discovery will first be from defendant's eye-view, making reference in addition to Dunkin Donuts' various defenses. The plaintiffs' rejoinders, predicated upon their view of the discovery, will then follow.

While there are variations depending upon the issue, the essence which defendant distills from the discovery, as reflected by its memoranda in opposition to class certification, is that no franchisee was ever coerced into buying equipment or signs or taking the real estate lease from or through Dunkin Donuts. In this respect, defendant submits that the class action discovery supports the general proposition that individuals often turn to franchising precisely because they are attracted to a "turnkey" or "package" deal. This, says the defendant, is what the franchisor offers. Defendant contends that its site selection expertise, production and merchandising expertise, advertising expenditures and other services have enabled it to attract its franchisees. Defendant also contends that to the extent those franchisees acquired from or through it the premises in which they conduct their businesses, the equipment by which they make and sell their products and the signs by which they announce their presence in their communities, they did so because it was the very availability of such products and services through defendant that attracted them to Dunkin Donuts in the first place.

Although the franchisees were limited by contract to buying supplies from approved vendors, defendant maintains that such contractual provision was a valid quality control device to protect the Dunkin Donuts trademark for the benefit of all the franchisees and that approval of new vendors was not unreasonably withheld. Moreover, defendant claims that it is the burden of each putative class member asserting a supplier tie-in claim to prove that he attempted to secure qualification of a new supplier and, because of defendant's contrariness, failed.

As a defense to the alleged breaches of fiduciary duty and claims of common law fraud, defendant denies that there was any mishandling or misrepresentation on its part such as would give rise to a cause of action. Finally, plaintiffs' assertion that the restrictive covenants are illegal is disputed by defendant's allegations that the covenants are reasonably related to protecting a legitimate interest of the franchisor and the other franchisees.

Whether or not the above defenses will be effective in shielding Dunkin Donuts from liability on the merits, defendant contends that, in any event, trial of the issues raised by its refutation of plaintiffs' claims and its substantive defenses will require individual proof varying from franchisee to franchisee and that the case is not suitable for class treatment. It is defendant's assertion that, given the variations in and general manner of the conduct of defendant's business, it is to be expected that any one franchisee's tying claims against the defendant will be based, however firmly or weakly, on his own individual and distinct dealings with defendant. The defendant relies on portions of the class action discovery, including depositions of some of the named plaintiffs, to buttress its conclusions that even if some of the plaintiffs were coerced into buying items from Dunkin Donuts, forced purchases of unwanted items were not widespread or even a policy of Dunkin Donuts. With regard to the fiduciary duty and common law fraud claims asserted by plaintiffs, defendant takes primarily the same position, but not only with respect to proof of facts. Defendant also contends that liability under the non-antitrust theories would be governed by state law concepts which would vary in the case

of each franchisee, rendering class certification inappropriate for that additional reason.

The foregoing overview of Dunkin Donuts' defenses highlights an important point: the core of defendant's opposition to class certification lies in its advancement of the individual coercion doctrine. Our rejection of that doctrine as an accurate rendering of tying law undercuts much, though not all, of defendant's submission of class action discovery facts. Our own synthesis of the law will require a review of the extent to which Dunkin Donuts' company policy is prima facie demonstrable in the alleged tying areas as a substitute for the *Siegel II* express contractual tie to prove use of economic power. In the ensuing survey we will omit reference to the restrictive covenant claims, the real estate tax escrow claims, the advertising claims and the common law fraud claims, mainly because their resolution depends more upon a discussion of legal issues than upon a factual review. Accordingly, we will take those issues up in the class action discussion which follows the class action discovery survey.

B. *The Equipment Tie-In Claim.*

The defendant's first approach to the equipment tie claim is to suggest that the pre-November 1970 contractual provisions expressly requiring franchisees to purchase their equipment packages from Dunkin Donuts were not rigidly enforced and that the franchisees were allowed to delete any item of equipment for which they wished to make their own arrangements.[60] Defendant points to

60. As evidence of this fact, defendant quotes the deposition testimony of David P. Segal, Dunkin Donuts' Senior Vice President:

Q. When the franchisee purchases an equipment package —let's go back to pre-November 1, 1970—does he have to take the whole package?

A. I think that the package of equipment was part of the franchise, was often varied, especially when we were dealing with a multi-unit operator who already had certain items of

ten pre-November 1970 franchisees identified as making deletions from the equipment package purchased from Dunkin Donuts and notes that five of these franchisees were so-called "virgin" operators. Why these franchisees did make deletions and other franchisees did not, states defendant, cannot be answered by any inference of coercion but requires individual examination of each franchisee's dealings with Dunkin Donuts.

Moreover, defendant contends that, assuming for the sake of argument that individual proof of coercion is not essential as to the pre-November 1970 franchisees, there is still not a certifiable class claim. In support of this contention, it points to the various general categories of exceptions which could be excluded from the class. Thus, defendant maintains that franchisees purchasing a "used" store even prior to November 1, 1970, and franchisees of new stores which were already equipped when purchased have no tie-in claim.[61] To these general categories of

60. (Cont'd.)

equipment and it was not necessary for him to repurchase equipment.

And also, there were occasions where, for some reason, a franchisee would want or have preference for some other equipment that might have been acceptable to the company. And I am thinking specifically about—I know the proof box, which is a pretty substantial part of the package. A number of operators preferred certain other equipment which was approved by us, and we were certainly—we certainly cooperated with them when they wanted to buy that other equipment.

Q. Are you talking about another make proof box or something besides a proof box?

A. A different make, different manufacturer of the equipment.

There were alternative items of equipment that could do the same job, in our opinion. They were always allowed to replace equipment of that kind.

(Segal dep. at 180-81).

61. Defendant may not be successful in franchising a shop before it is ready to open or before the franchisee has completed his training and, in such circumstance, may open and operate the shop

exceptions, defendant would add two more: franchisees who purchased more than four years before commencement of the action and whose claims are therefore barred by the antitrust statute of limitations, and franchisees whose shops opened after November 1, 1970, and who therefore were extended the option of converting to the post-November 1970 form agreement.

Turning to the post-November 1, 1970 contract, it will be recalled that plaintiffs have argued that the practical economic effect of the thirty day option clause is to compel franchisees, or at least first-time franchisees, to purchase their equipment from defendant. Defendant maintains that this is not so for two reasons. First, it says the thirty day period is not the period in which franchisees must purchase their equipment from other sources or arrange for its purchase or even decide what vendors they want to use. It is, defendant contends, simply the period in which they must decide whether they are going to buy any part of it from Dunkin Donuts. Thus, the practical economic effect of this clause, from the point of view of defendant, is to give Dunkin Donuts the time, if the franchisee decides to buy from it, to order the equipment,

61. (Cont'd.)
itself before a franchisee assumes possession. Moreover, there are two other ways in which franchisees commonly acquire their outlets other than as a new store. One occurs when a franchisee determines to sell his franchise; in this circumstance the purchaser will typically enter into a franchise agreement with defendant, enter into a purchase and sale agreement with the existing franchisee for the equipment, signs, inventory, etc., and either assume the seller's lease or enter into a new lease or sublease with defendant. Dunkin Donuts does not participate in the sale of equipment, signs and inventory at all. The other manner in which a franchisee may acquire a "used" store occurs when one franchisee cedes his store to Dunkin Donuts, which then refranchises it to a new franchisee. In this type of transaction, the documentation also typically consists of a franchise agreement, a purchase and sale agreement and a lease or sublease.

arrange for its delivery and installation, prepare the necessary documentation, arrange the necessary financing and make the appropriate U. C. C. filings. Moreover, argues defendant, extracts from the testimony of individual plaintiffs elicited a variety of responses as to the effectiveness of the thirty day option. For example, whereas plaintiffs quote Mr. Hegazi for the proposition that the 30 day option clause is "totally unrealistic" and does not afford the franchisee enough time to make a real choice, defendant cites the deposition testimony of Mr. Thomas who stated that 30 days would have been sufficient time to assemble the equipment package on his own with the help of others, which was readily available (Thomas dep. at 71-72). The effect of such varying testimony, defendant again asserts, is to create individual questions which cannot easily or properly be dealt with in a class action.

Secondly, defendant maintains that there is simply no indication on the record of any general policy or practice countervailing the individual choice expressly confirmed in the form agreements. To buttress this contention, it points to portions of the deposition testimony, for example that of Albert T. Vermeire, Dunkin Donuts' Director of Franchise Sales. When asked whether he could recall on approximately how many occasions a franchisee asked him whether he could purchase his equipment elsewhere than from Dunkin Donuts, Mr. Vermeire testified that perhaps one out of every four or five franchisees inquired as to the feasibility of so doing. Furthermore, Mr. Vermeire testified that on those occasions where a franchisee did not ask whether he could purchase his equipment elsewhere, he did not specifically tell him that he had to buy his equipment from Dunkin Donuts. (Vermeire dep. at 150-51). Defendant also refers to the deposition testimony of Messrs. Wainrober, Swahn and Giannuzzi wherein each

admitted that he was not compelled to purchase all his equipment from defendant. (Wainrober dep. at 37; Swahn dep. at 58-59; Giannuzzi dep. at 34-40). In point of fact, Mr. Giannuzzi, when asked whether he was "after" the package deal, testified that this was so.

The defendant concedes, see discussion *infra,* that the great majority of franchisees purchased their equipment from defendant. It contends, however, that the record also shows that there are significant reasons of convenience and attractiveness that would tend to account for these purchases. Moreover, defendant maintains that while it is theoretically possible that coercion, rather than convenience, accounted for some or many franchisees' purchases both before and after November 1, 1970, this conclusion cannot be based on an inference from that portion of record data which plaintiffs cite. Nor, defendant continues, since the experience was substantially the same under both agreement forms, can it be based on any post hoc reasoning from the language of one of those forms. Finally, Dunkin Donuts asserts that it is at least as likely that both pre and post-November 1970 franchisees purchased as a result of lawful considerations, as that they purchased as a result of unlawful considerations, concluding that this can properly be determined only on an individual basis.

Plaintiffs view the class action discovery from a very different vantage. With respect to the practice of Dunkin Donuts prior to the November 1, 1970 change in the form franchise agreement, plaintiffs point to other portions of the deposition testimony of Mr. Vermeire wherein he admitted that prior to November 1, 1970, it was the policy of Dunkin Donuts to require new franchise operators to purchase the Equipment Package from Dunkin Donuts.[62]

62. In a memorandum prepared by Vermeire to provide answers to policy questions most frequently asked by franchisees, the following question and answer appear:

Plaintiffs also maintain that there is documentary corroboration for this testimony in that the advertisements by Dunkin Donuts clearly imply that the equipment is part of the whole package deal. For instance, plaintiffs point out, the prospectus issued by Dunkin Donuts on February 6, 1968, states:

62. (Cont'd.)

Q. Can the franchisee buy a portion or all of his equipment elsewhere to start his franchise? How about after he has opened?

A. No—must purchase all original equipment on equipment list from us. . . . He can, however, purchase a vitality orange juice dispenser and approved soft drink machines. All other additional equipment must have written permission by Dunkin Donuts of America, Vice-President.

(Plaintiffs' Exhibit 2 to Vermeire deposition.) Vermeire testified during the deposition that the answer contained in this quotation was the Dunkin Donuts policy (Vermeire dep. at 36, 70); that this policy was given him by a senior vice-president and other high officers of Dunkin Donuts (Vermeire dep. at 63); and that this policy had been the consistent policy and practice of Dunkin Donuts until November 1, 1970 (Vermeire dep. at 56-59, 62-63, 68-70, 72, 55-58). Vermeire testified during the deposition as follows:

Q. My question is: If he asks, you tell him that it is a part of the package, the whole package, and he says: "Well, I want to be a Dunkin Donut franchisee but I want to buy the equipment from another source."

You said this occasionally has come up. What do you tell him? Can he become a Dunkin Donut franchisee and yet buy the equipment from another source?

A. He cannot, for the reasons I mentioned, prior to June 1970.

Defendant objects to plaintiffs' utilization of Mr. Vermeire's testimony to establish proof of the existence of a uniform policy on the part of Dunkin Donuts to coerce the franchisees into buying their equipment from Dunkin Donuts. Rather, defendant contends that Mr. Vermeire's testimony reflects an effort on the part of Dunkin Donuts only to formulate a uniform policy. Defendant states that Mr. Vermeire was assigned certain questions for which he proposed answers to be discussed at the Franchise Review Session. His replies, according to defendant, were suggestions only and, in fact, were never adopted.

> Prospective Dunkin' Donuts franchise owners enter into a franchise agreement and an equipment agreement with the company. . . . Prospective franchise owners also execute an equipment agreement under which the company furnishes equipment necessary to operate a Dunkin' Donuts shop. . . .

More significantly, however, plaintiffs point to evidence from the class action discovery that, prior to November 1, 1970, 405 of approximately 406 franchisees purchased the equipment package from Dunkin Donuts, that only 7 or 9 of the 405 franchisees purchasing from Dunkin Donuts made *any* deletions from the equipment package, and that the persons making the abovementioned deletions were either multiple franchisees or former employees of Dunkin Donuts. It is plaintiffs' contention that these figures, combined with the fact that those franchisees who purchased the equipment from Dunkin Donuts paid between $7,000 and $22,000 more for the equipment than they would have had to pay if they were free to purchase the equipment in a competitive market, effectively foreclose any argument by defendant that the equipment clause was not vigorously enforced.

With respect to the post November 1, 1970 equipment contract, plaintiffs take the position that the option provision, hedged about by the unreasonable time strictures within which the franchisee must make the choice, imposes no less of a tie than its predecessor. Moreover, according to plaintiffs, those franchisees that inquired about the thirty day option were subtly pressured by Dunkin Donuts not to pursue purchasing the equipment on their own. In this regard, plaintiffs point to the deposition testimony of plaintiff Cerajewski, taken on October 23, 1973, at pages 37-38. There Mr. Cerajewski testified that Dunkin Donuts "persuaded" him to purchase the equipment items from Dunkin Donuts by informing him that the franchisee-franchisor relationship was like a "marriage" in which the parties "have to trust one another." Plaintiffs' contend that this approach was made to virtually every new franchisee. They further contend that, by virtue of the imbalance in experience, financial strength and bargaining power, Dunkin Donuts was in a position of dominance over the franchisee, and that this kind of persuasion was thus effective in inducing the franchisees to comply with Dunkin Donuts' suggestions. As further evidence of this pressure, plaintiffs point to evidence in the class action discovery that despite the uneconomic nature of purchasing the equipment from Dunkin Donuts, only 17 franchisees out of approximately 364 units added or deleted items from the equipment package after November 1970. Furthermore, the additions and/or deletions were minor in a large majority of the cases. There were only two or three franchisees who added and/or deleted more than $5,000 worth of equipment. The large majority of the remaining franchisees made minor additions and/or deletions which average out to approximately $500.

The plaintiffs have thus developed statistical data and other evidence sufficiently impressive to counter defendant's claims as to conclusive absence of an effective company policy and to make out a *prima facie* claim that there, in fact, was a company policy to influence franchisees to purchase their equipment from Dunkin Donuts. The significance of this state of affairs will be described in our class action discussion below.

C. *The Supplier Tie-In Claim.*

Dunkin Donuts' Franchise Agreement provides that franchisees can purchase materials from "non-approved vendors" only so long as these vendors can meet Dunkin

Donuts' specifications and thereby become approved vendors.[63] Defendant first contends that this provision simply requires that the franchisees purchase certain categories of ingredients and supplies from any manufacturer who has demonstrated an ability to meet Dunkin Donuts' standards and specifications as a means of protecting its trademark through quality control. To the extent that these requirements prevent franchisees from dealing with vendors who have not been approved or who have been rejected in the approval process, defendant concedes that they restrain trade. However, viewed from the perspective of the defendant, such restraints do not violate the antitrust laws since they are reasonable efforts to protect both itself and its franchisees who depend on the high regard of the public towards the Dunkin Donuts logo to attract customers.

A more reliable forecast of illegality under the antitrust laws, defendant concedes, would be provided by the

63. Defendant notes an exception to the extent that some franchisees have been permitted to buy supplies from any source. Plaintiff Daratony, for example, testified that while he generally uses only approved supplies, he has used unapproved shortening because of its lower price (Daratony dep. at 120). He continued to use the unapproved shortening until it was no longer available. According to defendant, the deposition testimony of Daratony shows that at no time during his use of the unapproved shortening did anyone from Dunkin Donuts ever object to its use or tell Daratony that he was not permitted to use it. (Daratony dep. at 121). Also, plaintiff Hudock testified that he often used non-printed (non-approved) paper goods in his shop, even when printed goods were available, because non-printed items cost less. (Hudock dep. at 112). According to defendant, Hudock continues to use four non-printed items and has not received any threats of disenfranchisement (Hudock dep. at 113-114). In addition, Hudock has consistently used unapproved shortening for the last five years, and has received no threats or criticisms from Dunkin Donuts (Hudock dep. at 128-129). Finally, according to defendant, plaintiff Hegazi is now permitted to purchase unapproved shortening (Hegazi dep. at 95).

argument, advanced by plaintiffs, that defendant has been guilty of "footdragging" or furnishing "useless" specifications to proposed suppliers in order to maintain the exclusivity of those already approved suppliers from whom defendant receives "kickbacks" and "grand opening contributions." Defendant argues that such is not the case and presents both deposition and documentary evidence to buttress this assertion.[64] Dunkin Donuts first points to the affidavit of Andre Bolaffi, the Director of Research and Development at Dunkin Donuts, who stated therein that it was his conclusion that defendant's specifications were "good." In Mr. Bolaffi's affidavit and accompanying exhibits he described the quality control function at Dunkin Donuts, including the constant evaluation and upgrading of specifications, the testing of new suppliers for approval, and the monitoring of performance of existing approved suppliers.

As of late 1973, there were five approved suppliers of flour and cake mixes, two approved suppliers of shortening, five approved suppliers of fillings and toppings, seven approved suppliers of coffee and twenty-two approved suppliers of paper goods.[65] In addition, as of November 1973, there were seven coffee companies, seven shortening companies, four mix companies and thirteen fillings and toppings companies in the process of approval or ready for testing. As of November 1973, defendant is said to have given its specifications for various products and ingredients to numerous potential suppliers and fran-

64. Defendant points out that while 13 suppliers made new shop opening contributions, 19 did not.

65. Answer to Interrogatory 3 of the Rader class action interrogatories at 12-15. The list of Dunkin Donuts approved suppliers includes some industry giants like Pillsbury and General Foods as well as some lesser known companies such as Victor Coffee Co., Orchard Products and Sheri Cup Co.

chisees.[66] Defendant maintains that while most of these suppliers and potential suppliers had been sought out by Dunkin Donuts, many were approved or inquired into as a result of franchisee initiative.[67] Dunkin Donuts states that some manufacturers sponsored by franchisees have not met its standards,[68] but that in any event the franchisees are free to promote new sources for approval, although many franchisees have allegedly made no effort to do so.[69] Consequently, defendant maintains that trial of this claim promises to involve individual inquiry into each manufacturer proposed by any franchisee whose request was denied and would result, at best, in a random liability finding as to a few franchisees.

66. See Rader Answer to Interrogatory 6, at 23-30c, listing 95 manufacturers and 19 franchisees owning 41 franchises to whom specifications had been sent.

67. For example, Rader is one of the franchisees who claims to have attempted to secure approval for new suppliers (Rader dep. at 98-101). Halper Brothers, upon Rader's application, was approved as a supplier of paper goods. Burwell, another named plaintiff franchisee, sought to have a new supplier approved. Defendant points to the fact that Michigan Fast Foods, upon Burwell's application, became an approved supplier for paper goods, jellies, flour and shortening in 1961. Finally, Hudock, along with several other plaintiffs in this action, was successful in obtaining approval for an additional paper supplier, Michigan Popcorn.

68. Cerajewski is another one of the franchisees who has been very active in attempting to secure approval for two new suppliers —the Karp Company and the Conrad Kern Company. At the time of this writing, neither company has become an approved supply vendor. Rader is another franchisee who attempted to secure approval for a new supplier, Globe, which was met with refusal. Finally, Hudock forwarded jelly samples to Dunkin Donuts for approval in 1969. To Hudock's knowledge, the jelly manufacturer never attempted to contact Dunkin Donuts directly, and Hudock never received either approval or disapproval for those jellies. (Hudock dep. at 107-108).

69. For example, defendant states that during their years as Dunkin Donuts franchisees, Pallantios, Daratony, Hegazi and Wainrober never sought approval for a new supplier. (Pallantios Answer to Interrogatory 19; Daratony Answer to Interrogatory 19; Hegazi dep. at 103; Wainrober dep. at 101).

The plaintiffs, on the other hand, assert that Dunkin Donuts' quality control procedures do not represent the least restrictive available method for protection of the trademark and that they are, therefore, violative of the antitrust laws. Plaintiffs list various other methods which they assert can be used to achieve quality control. One method would be to permit independent purchasing by the franchisee of products conforming to the franchisor's specifications, with the franchisor insuring quality control through inspection of the franchisees. Another method, according to the plaintiffs, would be to allow discretionary purchases by the franchisee on the condition that the franchisor could terminate franchisees who purchased products which did not meet the specifications of Dunkin Donuts.

In any event, plaintiffs contend that Dunkin Donuts' quality control procedures result in the imposition of an illegal tie because of defendant's arbitrary enforcement. In their briefs and exhibits they quote extensively from the deposition testimony and documentary evidence to advance their arguments: (1) that defendant maintained a system of rebates and contributions from approved suppliers that was financially beneficial to Dunkin Donuts at the expense of its franchisees; and (2) that defendant, when confronted with an application by a franchisee to approve a new supplier, employed dilatory and obfuscatory methods so as to avoid approval, and foster and maintain its "kickback" system.

With regard to the system of exacting rebates and a grand opening contribution from approved suppliers, plaintiffs contend that this was uniform conduct by the defendant, typified by correspondence which clearly indicates the tie-in with the various suppliers and its effect upon the franchisees. They point, *inter alia,* to letters dated August 22, 1968 (Exhibit "T") and September 18,

1969 (Exhibit "U") between Dunkin Donuts and Pillsbury Company which are said to show a kick-back for $10,000 from Pillsbury to Dunkin Donuts. The inference plaintiffs draw from this and similar letters is that any approved supplier wishing to continue in that status was required to "kick-in" the rebates.[70]

In support of their allegations that defendant employed dilatory and obfuscatory tactics in rejecting suppliers suggested by the franchisees, plaintiffs first allude to the deposition testimony of plaintiff Cerajewski, who has been attempting to secure approval for two new suppliers—the Karp Company and the Conrad Kern Company. With regard to Karp, Cerajewski's knowledge on October 23, 1973, the time of his deposition, was that Karp's samples were still in the testing process and that they had been neither approved nor disapproved, although the original application for approval was submitted to Dunkin

70. Plaintiffs also rely upon: (a) a letter dated April 16, 1970, from Popsicle Industries to Robert Rosenberg, President of Dunkin Donuts, in which Dunkin Donuts is collecting $7,286.61 in rebates as a result of opening sales to the franchisees (Exhibit "Q"); (b) inter-office correspondence dated November 24, 1970, from Thomas R. Schwarz, an employee of Dunkin Donuts, in which he discusses the defendant's policy of selecting suppliers and determining the amount of contribution (Exhibit "V"); (c) a schedule of supplier contributions along with a form letter sent to all suppliers from Al Bennet, Director of Marketing for Dunkin Donuts. (Plaintiffs infer from this communication that if the suppliers desire to continue supplying the franchisees, they must accede to the demands of Dunkin Donuts in the form of a grand opening contribution); and (d) confidential interoffice correspondence, dated January 13, 1971, from Thomas Schwarz in which he estimates that suppliers will contribute $75,000 in 1971. See also plaintiffs' Exhibit "DD," comprised of inter-office correspondence dated November 4, 1971, from Len Geller in reference to Middleby Co., a supplier who would not pay their $250 per store contribution until they did $2500 in sales from each franchise operation in which they gave the $250 contribution. With the attached letter, dated October 28, 1971, is a dunning statement, which was sent to Middleby in the amount of $3000 for grand opening contributions, notwithstanding defendant's alleged new policy of not trying to force suppliers to contribute if this would increase the cost to the franchisee.

Donuts 2½ years earlier—in February 1971.[71] With regard to Kern, Mr. Cerajewski testified that in 1971 the association of Dunkin Donuts franchisees, of which he was a member, caused their attorney to write to Dunkin Donuts requesting specifications to be delivered to the Conrad Kern Company. Finally, in October 1973, the Kern Company received the specifications from Dunkin Donuts (Cerajewski dep. at 111-115).[72] As a result of these two experiences, plaintiff Cerajewski concludes that although he has tried to get new suppliers approved, "when you try to go through [Dunkin Donuts'] channels, it is impossible to get . . . . [T]here is so much work involved in getting another supplier approved that it almost takes a heroic effort to accomplish. There are too many obstacles." (Cerajewski dep. at 111-15).[73]

71. Defendant refutes Cerajewski's testimony and states that the time lapse involved in Karp's request for approval as a mix supplier was, in fact, only seven months—from February 1971 to September 1971. Dunkin Donuts avers that the request for approval was received in February; Karp's first samples were tested in March; further samples were received in May; these were tested again in August, and results available in September indicated the presence of salmonella and pseudomonas in Karp's product. Disapproval was promptly communicated to Karp who continued to make subsequent efforts to gain Dunkin Donuts' approval.

72. With regard to the Conrad Kern Company, defendant asserts that a request for approval was first communicated to Dunkin Donuts in November 1972. It is Dunkin Donuts' assertion, based on communications in its files, that the delay in sending specifications was due, in great part, to Kern's actions and a mixup in the U. S. Postal Service.

Furthermore, defendant contends that the record of Dunkin Donuts' experience with the Karp Company and the Conrad Kern Company is obviously not dispositive as to its relations with all franchisees and manufacturers who ever sought approval.

73. Two other named plaintiffs have expressed similar viewpoints. Burwell recites one discussion he had with his district sales manager as constituting a request for specifications. Burwell, at one time, was using a product that was not approved in his store and, in response to a statement by his district sales manager that he should remove the product, Burwell asked, "I can try to get it

Another method which defendant is alleged to employ to prevent approval of new suppliers suggested by the franchisees is the furnishing of "useless" specifications that cannot fairly be met by a new applicant. As evidence of this fact, plaintiffs point to a report by Dr. Andre Bolaffi, Director of Research and Development for defendant since 1971 (Plaintiffs' Exhibit "FF"). This report, entitled "Research and Development at Dunkin' Donuts of America, Inc.," was prepared by Dr. Bolaffi in April 1972 for defendant's use. Plaintiffs quote the relevant parts in their brief, with strong emphasis on the following language:

> Previously established draft specifications for coffee, shortening, mixes and fillings were, for the most part, not realistic. They did not reflect meaningful and factual data and were incomplete. As such, these specifications were useless, since they could not be used as a standard to measure and/or monitor product quality. Hence, correct and meaningful specifications had to be developed in conjunction with field operations, suppliers, and in some cases the consumer.[74]

In sum, plaintiffs contend that the record presents a common question for trial with respect to the existence *vel non* of a policy or practice on the part of Dunkin Donuts to tie

73. (Cont'd.)
approved, who do I go to?" In response, the district sales manager is claimed to have stated, "[b]elieve me, we tried it and you are not going to get it approved—forget it." (Burwell dep. at 153). Hudock, another franchisee, was successful in obtaining approval for an additional paper goods supplier. As Hudock described the approval process, "finally, after many meetings and arguments and fighting, Dunkin finally agreed to let Michigan Popcorn handle the paper goods." (Hudock dep. at 109).

74. Defendant decries plaintiffs' use of this report "in a vacuum." It contends that Dr. Bolaffi's deposition testimony qualifies and explains the language cited from the report.

to the grant and maintenance of the franchise the obligation to purchase the supplies of an arbitrarily limited group of vendors from whom defendant receives secret "contributions." As will be seen *infra,* we agree that such a viable trial issue exists.

D. *The Sign Tie-In Claim.*

Defendant's response to the sign tie-in claim asserted by the plaintiffs is similar to its response to the equipment sales claim, *i.e.,* that these purchases were voluntary and non-coercive.[75] Moreover, as an example of the allegedly outcome determinative variations in the experiences of the class members that are likely to be brought to light at trial, defendant presents detailed histories of the named plaintiffs. For example, Dunkin Donuts points out that Wainrober never expressed an interest in shopping for his own signs and, in fact, took it for granted that Dunkin Donuts would arrange their purchase for him. (Wainrober dep. at 37).[76] Conversely, Rader purchased signs for his Elizabeth, N. J. store from one of Dunkin Donuts' recommended suppliers, but not without some discussion of the matter. According to Rader's testimony, he inquired of a Dunkin Donuts representative whether he could buy the signs from a supplier other than the one recommended by Dunkin Donuts. In response to the explanation that Dunkin Donuts resired all its signs to be uniform and the "strong suggestion" that Rader not use a different supplier, Rader

75. Defendant also asserts a quality control justification for this alleged tie-in practice.

76. Defendant cites other instances in which franchisees either raised no questions regarding sign purchases or indicated that the system of purchase recommended by Dunkin Donuts was attractive to them. For instance, Pallantios, until he negotiated for his fourth Dunkin Donuts shop, was seemingly happy to purchase the signs from or through Dunkin Donuts. Also, it was Giannuzzi's wish that Dunkin Donuts put together the entire package for him, including the signs. (Giannuzzi dep. at 34).

dropped the subject completely. (Rader dep. at 27-28, Answer to Interrogatory 4.)

Despite defendant's protestations to the contrary, plaintiffs contend that, in reality, Dunkin Donuts has a policy of pressuring its franchisees, through thinly veiled threats or strong paternal advice, to purchase their signs either from Dunkin Donuts or from a company from which the defendant receives substantial and secret "kickbacks." As evidence of Dunkin Donuts' practices to this effect, plaintiffs allude to the depositions and answers to interrogatories of many of the franchisees. For instance, Mr. Burwell testified that he asked a Dunkin Donuts representative whether he could buy the signs from someone other than Dunkin Donuts and was told "no, it had to be bought through them." (Burwell dep. at 14-17). Likewise, Mr. Pallantios claims that he was subjected to pressure from Dunkin Donuts to purchase signs from the company for his fourth store. The examples of pressure cited by Pallantios are found in his Answers to Interrogatories 4 and 12 wherein he contends that both attempts to influence him occurred at meetings attended by Dunkin Donuts franchisees and Dunkin Donuts employees. At a June 1966 meeting of the Purchasing Committee, Pallantios claims that he asked whether he could purchase signs for his North Olden Avenue store from a local company. Dunkin Donuts replied that the local company could not possibly give Pallantios a lower price, and Pallantios received a "strong recommendation" that he purchase the signs from Dunkin Donuts because the opening could be delayed if the signs were not delivered promptly. The other instance of pressure occurred at an Advisory Council meeting,[77] when Pallantios told a Dunkin Donuts employee that he had received a much lower quote for signs from the "State Sign people." The response, according to Pallantios, was that he was being "low-balled" and that when the company got the job, he could end up paying more. In addition, Pallantios was told that delivery dates were important and that if the shop could not open on time because signs were not there, Pallantios would be held responsible for the late opening. (Pallantios dep. at 13, 25-26).[78]

Plaintiffs contend that there is substantial evidence on the record from which the court could conclude that the defendant is receiving large sums of money from the sign vendors as a result of the illegal tie-in of the signs. They point to certain correspondence to buttress this contention, *e.g.*, letters from Cummings and Co. to William Bebe of Dunkin Donuts [79] and inter-office memoranda of the defendant.[80] with regard to the secret nature of these kick-

77. The Advisory Council is a group of elected franchisees and company representatives in each area of the country which meets regularly to discuss grievances, exchange ideas and provide a chan-

77. (Cont'd.)

nel for communication by franchisees directly to the executive level of the franchisor.

78. Plaintiffs cite other instances in which Dunkin Donuts brought subtle pressure to bear upon a franchisee in order to "convince" him to order his signs from or through Dunkin Donuts. For instance, although Hegazi had a friend in the sign business and wanted to purchase from him, he accepted Dunkin Donuts' explanation that Dunkin Donuts had a manufacturer who made signs especially for it. (Hegazi dep. at 29). Also, Mr. Swahn testified that he had a relative in the sign business and mentioned getting a price from him to Dunkin Donuts. According to Swahn, defendant's response was that it had a sign company who had the molds and it couldn't possibly be done cheaper than what they could do it for. (Swahn dep. at 57-58).

79. According to the plaintiffs, this letter shows that the franchisee signs a security agreement as a result of his purchasing the signs from Cummings for $6,3050.00, which also includes Dunkin Donuts' "commission" of $1,850.00.

80. Plaintiffs particularly emphasize an inter-office memorandum, dated April 5, 1968, from Robert Rosenberg, President of Dunkin Donuts (Exhibit "II"). This memorandum shows that the signs were transfered to the equipment package because the sign

backs, plaintiffs recite the testimony of Albert Vermeire, Director of Franchising for Dunkin Donuts, taken in the *Ungar* case. Mr. Vermeire testified that, to his knowledge, the bills for signs that were sent to the franchisees by the approved sign vendors showed a total price. Thus, the commission payable to Dunkin Donuts by the vendor, although constituting part of the total charge, was not designated as such on the bill to the franchisee (Vermeire dep. at 83-85).[81]

As will in due course appear, we believe, with respect to the question of signs as well as equipment, that in terms of ultimate trial a common issue of Dunkin Donuts' company policy exists and predominates.

E. *The Real Estate Tie-In Claim.*

In a number of ways, defendant counters plaintiffs' assertions that it imposes a tie with respect to the real estate where the Dunkin Donuts franchise is conducted. First, defendant points to the franchise agreement forms which it has utilized over the years and which posit that the franchisee may be holding his property or erecting his

80. (Cont'd.)
companies did not want to include in their financing agreement with the franchisee the $1800 rebate to Dunkin Donuts. Also, Rosenberg reiterates the defendant's policy of charging a fixed mark-up on the signs regardless of the number of signs a franchisee purchased. According to plaintiffs, this memorandum clearly shows that the defendant would only deal with those sign companies who would give Dunkin Donuts the $1800 kickback.

81. Defendant claims that Vermeire's testimony, as cited by the plaintiffs regarding the alleged sign tie-in, is misleading. Read as a whole, Dunkin Donuts argues, Vermeire's deposition supports its contention that the franchisees were free to purchase signs after 1966 from any sign company they wished. Moreover, Vermeire testified that Dunkin Donuts no longer engaged in the practice of receiving commissions from sign vendors after September 1969 (Vermeire dep. at 75-78).

building pursuant to his own independent arrangements.[82] Second, in support of its assertion that the company policy is to encourage franchisees to make their own real estate arrangements, defendant points to the "Dunkin' Donuts Rental Policy" booklet which is given to new and existing franchisees,[83] the affidavit of Dunkin Donuts' President Robert Rosenberg,[84] and a document entitled "Questions

82. For example, the current form of agreement (Exhibit 1-13 to Rader Answer to Interrogatory 1) states:

2. DUNKIN' DONUTS agrees:

A. To select the location for the DUNKIN' DONUTS SHOP; or, in the event the FRANCHISEE makes his own selection, to approve the location if it meets the standards employed by DUNKIN' DONUTS in selecting other locations at the time;

B. At the FRANCHISEE's request, to develop and lease the DUNKIN' DONUTS SHOP, through a subsidiary, to the FRANCHISEE; or, in the event the DUNKIN' DONUTS SHOP is under development on the date this Agreement is executed, to lease the DUNKIN' DONUTS SHOP, through a subsidiary, to the FRANCHISEE;

C. To provide, in the event the FRANCHISEE elects to develop the DUNKIN' DONUTS SHOP, the plans and specifications and the benefit of DUNKIN' DONUTS' experience in the design and construction of DUNKIN' DONUTS SHOPS.

83. On page 1 of the booklet is the following statement:

It may come as a surprise to many that the Company views its real estate involvement as a poor financial venture and only utilizes leasing or real estate ownership as a necessary means to open additional shops and enable Dunkin' Donuts to grow. Our policy has been to avoid real estate involvement where possible and, in fact, because of limited funds in a restrictive money market, we encourage all new and existing owners who want additional shops to find and finance their own realty. This would ease the financial burden on the Company and would also enable the franchise owner to save the rent mark-up and percentage override for himself.

(Exhibit "J" to Def. First Class Action Brief and Def. Post-Argument Brief, at 31).

84. Rosenberg stated that "[i]t has never been the policy or practice of Dunkin' Donuts to require franchisees to lease or sublease premises from Dunkin' Donuts." (Rosenberg Affidavit, ¶ 14, 15).

and Answers about Dunkin' Donuts" which is allegedly given to prospective franchisees and states that franchisees can have their own real estate.

Defendant also asserts that the class action discovery shows that many of the named plaintiffs had no interest in buying their own property or dealing directly with the prime lessor. For instance, Rader testified that he did not recall having any discussions with Dunkin Donuts about developing his own site for any Dunkin Donuts shop; nor had he ever tried to get a franchise for a location which he owned or leased directly other than from or through Dunkin Donuts (Rader dep. at 127). Likewise, Pallantios testified that he did not recall raising any questions regarding the ownership of the property on which any of his shops are presently located. Rather, the "turnkey" nature of the Dunkin Donuts operation was attractive to him in that he could devote energies elsewhere (Pallantios dep. at 29-31, 54). Moreover, Giannuzzi testified that from the very beginning of his discussions with Dunkin Donuts, he had intended that Dunkin Donuts be the owner of the real estate and the building constructed thereon so that it could then rent the property to him for the purpose of running the shop.[85] He allegedly desired to be a lessee

85. Defendant also points out that with regard to a second piece of property on Forest Avenue, Dunkin Donuts, after unsuccessfully attempting to negotiate with the landlord, told Giannuzzi that if he desired he should negotiate on his own. Giannuzzi obtained an option on the land, but the landlord refused to lease the property to Giannuzzi unless Dunkin Donuts was also on the lease. Before Giannuzzi could arrange the deal, his option expired. Giannuzzi is allegedly working on a location in another area at present. He plans to put his second shop in a building that is presently being used as a bowling alley in a shopping center. According to Giannuzzi, Dunkin Donuts' only desire with regard to that location is that it be given an option to take over the Dunkin Donuts shop in the event that Giannuzzi ever determines to abandon the business he establishes there. Although he is making all of his own arrangements for the shop, Giannuzzi testified at his deposition that he has received neither threats nor harassment from Dunkin Donuts (Giannuzzi dep. at 63-72).

rather than an owner not because of anything Dunkin Donuts told him, but rather because his net worth was so modest that he could not afford the prospect of ownership (Giannuzzi dep. at 21-22).[86]

In sum, defendant argues that even if some of the franchisees were misled or intimidated by an overzealous franchise salesman into taking a lease from Dunkin Donuts, the record does not show that defendant had a uniform policy of requiring that they do so. Defendant submits that the large number of franchisees who chose to lease their premises from defendant did so because they desired that type of arrangement for reasons of convenience or inability to gather the necessary funds to purchase the land on their own. Thus, Dunkin Donuts contends that class certification is inappropriate because proof of liability would entail that sort of individual inquiry that is proscribed by Rule 23.

Plaintiffs' rejoinder is that, despite the absence of a contractual requirement on the lease issue, realistically the franchisees had to agree to common practices of lease-back used by the defendant in order to utilize the Dunkin Donuts logo. As the plaintiffs view it, in actuality the franchisees could not bargain with other prospective lessors who could have lowered their rental costs, but were forced to acquiesce to the resolutely enforced policy of the defendant if they wanted the franchise. As the best evidence of this policy on the part of defendant, plaintiffs point to the fact that, despite the uneconomic nature of the leasing provisions, only 55 or so locations out of approximately 700 as of 1972 (about eight per cent) were held by franchisees free of any interest on

86. Similarly, according to defendant, Daratony was interested in being a lessee rather than an owner because being an owner would be too costly for him (Daratony dep. at 21).

the part of Dunkin Donuts. Moreover, according to the plaintiffs, Dunkin Donuts' statement in its "Rental Policy" booklet that it is not interested in the real estate business is not credible since, in fact, the largest producer of gross income for the company is rentals from franchisees. Plaintiffs cite the *Standard and Poors Reports* on Dunkin Donuts dated October 10, 1973. The report provides in part:

> In fiscal 1972, the company derived 39% of gross income from rentals of properties to franchisees; 24% from commissions, 20% from sales by company operated units; 12% from equipment sales and related service to new units; and 5% from other sources.

Plaintiffs further argue that it is clear from the deposition testimony of some of the named plaintiffs that although many would have liked to have made other arrangements with regard to their interest in the site of the store, they were precluded from doing so by the defendant. For instance, in 1971, Mr. Pallantios, who already owned other Dunkin Donuts stores, negotiated with Dunkin Donuts for a franchise to be located in Lawrenceville, New Jersey. Pallantios planned to own the land upon which the store was to be erected. The negotiations were allowed to proceed, according to Pallantios, until ". . . the deal was just about consummated. And then Bobby Rosenberg came down and said that I wasn't qualified to open—to have another franchise." (Pallantios dep. at 62). The given reason for Pallantios' non-qualification was the lack of quality in his product. However, Mr. Pallantios testified that such reason was a ruse in order to prevent Pallantios from owning his own land.

Testimony was also adduced from other franchisees to the effect that they were unsatisfied with the lease,

construction and override aspects of the contract but were told by defendant that these were a required and advantageous part of the deal. For example, plaintiffs Swahn, Thomae, Hudock, Burwell and Olivieri testified that they asked whether they could purchase the land and building themselves or enter into a lease with the prime lessor, rather than a sublease with Dunkin Donuts. In each case, they testified, the response of Dunkin Donuts was an emphatic "no" (Swahn dep. at 47-48; Thomae dep. at 29; Hudock dep. at 13; Burwell dep. at 35; Olivieri dep. at 38-40).

We believe (see discussion *infra*) that there is enough evidence of a Dunkin Donuts' company policy to enforce a lease tie-in to frame a common issue for trial.

VIII. The Class Action Discussion.

A. *Formal Requisites of Rule 23; the Applicability of Rule 23(b)(3) Rather Than Rule 23(b)(2).*

Before a class action may be maintained under F. R. Civ. P. 23, there must be a showing that:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

F. R. Civ. P. 23(a). In addition, the class proponent must satisfy one of the three conditions of rule 23(b). Plaintiffs have asked for class certification under both §§ 23(b)(2) and 23(b)(3). The burden is on the plaintiffs to show that the case is proper for class treatment and that they are appropriate representatives of the class.

Section 23(b)(2) certification is appropriate if the prerequisites of § 23(a) are satisfied and if, in addition, "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . ." (F. R. Civ. P. 23(b)(2)). The Notes of the Advisory Committee to the 1966 amendments to rule 23, 39 F. R. D. 69, 102 (1966), state that "[t]his subdivision [23(b)(2)] does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Moreover, Professor Moore expresses the view that where a plea for injunctive relief is appended as a "very secondary" consideration, the action should be classed within (b)(3), but where injunctive relief and damages would be equally appropriate remedies, and both may be obtained, the court should divide the suit into subclasses handled under the separate subdivisions of subsection (b). He also believes that in most private antitrust suits, even where the request for an injunction is sincere, the prospect of damages is so important that injunctive relief would usually not be "predominant." He concludes that "[i]n almost all such situations, the suit should be treated under (b)(3)." 3 B Moore, *Federal Practice* ¶ 23.45 at 23-708.09 n. 43 (2d ed. 1974) [hereinafter cited as Moore]. In a similar vein, in *Bogosian v. Gulf Oil Corp.*, 62 F. R. D. 124 (E. D. Pa. 1973), Judge VanArtsdalen refused to certify a (b)(2) class on the ground that money damages were, at the very least, a substantial element of plaintiffs' claim.

We agree with Judge VanArtsdalen and Professor Moore. While there are very significant claims for declaratory and injunctive relief involved in the present case, we believe that the damage aspect is so important that (b)(2) certification would be inappropriate. Declaratory and injunctive relief can be awarded in a (b)(3) action which also carries with it greater safeguards. Accordingly, we will confine our discussion hereinafter to whether plaintiffs have met the test of Rule 23(b)(3).

In order to certify a class under Rule 23(b)(3), we must find that the requisites of 23(a) have been satisfied and, in addition, "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." (F. R. Civ. P. 23(b)(3)). We will address the requisites of Rule 23 (b)(3) in the order stated in the rule, but will discuss the matter of common questions in conjunction with the issue of predominance.

B. *Numerosity.*

According to the class action papers, there are presently in excess of 400 Dunkin Donuts franchisees and approximately 200 former franchisees. We find that the class is so numerous that joinder of all members is impracticable. Defendant does not appear to contest this point.

C. *Typicality of Claims.*

Rule 23(a)(3) provides that a class action may be maintained only if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The Advisory Committee did not elaborate on the meaning of this requirement so that the extent to which this requirement differs, if at all, from the other requirements of Rule 23(a) is unclear. Indeed, Professor Moore has concluded that "there is no need for this clause, since all meanings attributable to it duplicate requirements prescribed by

other provisions in Rule 23." 3B Moore, *supra* ¶ 23.06-2, at 23-325.[86a]

The typicality requirement has been equated, *inter alia,* with the Rule 23(a)(2) requirement that the representative party adequately represent the class. See cases cited at 3B Moore, *supra* ¶23,06-2, at 23-325 n. 2-4. Professor Moore at one point quotes the typicality and adequacy provisions together. 3B Moore, *supra* ¶ 23.07[2], at 23-371. Judge Teitlebaum in *Herrmann v. Atlantic Richfield Co.,* 1975 Trade Cas. ¶ 60,115 (W. D. Pa. 1975), discusses typicality together with commonality and predominance. In the case at bar the claims of each plaintiff virtually track those of every other plaintiff. As will be seen below, the adequacy, commonality and predominance requisites are met. It follows that the typicality requirement is met; hence, we need not dwell upon it further.

D. *Adequacy of Representation.*

In its recent opinion in *Wetzel v. Liberty Mutual Insurance Co.,* No. 74-1515 (3d Cir., Jan. 23, 1975), our court of appeals (per Rosenn, J.) explained that the adequacy of representation requirement of Rule 23(b)(3) depends on two factors:

> (a) the plaintiff's attorney must be qualified , experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.

— F. 2d at — (footnotes omitted).

86a. Professor Kaplan, on the other hand, believes that the basis for the typicality requirement is the notion that the representative ought to be squarely aligned in interest with the represented group. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I),* 81 Harv. L. Rev. 356 (1967).

With regard to the first factor noted by the court in *Wetzel,* Mr. Berger is an acknowledged leader in the field of class action antitrust and securities litigation. Mr. Brown is an expert on the law of franchising, having written several volumes in the field. Mr. German and Mr. Manta have had experience not only in prosecuting, but also in defending class actions in the antitrust and securities fields and, in addition, have fine credentials in the field of general litigation. In sum, we believe that plaintiffs' attorneys are well qualified to conduct the proposed litigation.[87]

In this case, the important issue on adequate representation involves the second factor delineated by Judge Rosenn. Defendant alleges that there exist within the putative class several permutations or combinations of antagonism or conflict which militate against class certification. Defendant asserts: (1) that the interests of present franchisees differ from those of former franchisees; (2) that the interests of those who became franchisees before the standard franchise agreement was changed on November 1, 1970, may differ from those who became franchisees after that date; and (3) that the interests of multiple franchisees differ from those of the putative class members who own a single franchise.

The latter two points raised by the defendant give us no difficulty. We see no disparity between the interests of the pre and post-November 1, 1970 franchisees. There

87. In addition, we believe that the adequacy inquiry requires a finding that the representative party and his attorney can be expected to prosecute the action vigorously. As Judge Gurfein noted in *Wolfson v. Solomon,* 54 F. R. D. 584 (S. D. N. Y. 1972), in many cases such as this the possibility of recovering attorney's fees will provide the sole stimulus for the enforcement of the class rights. *See also Escott v. Barchris Construction Corp.,* 340 F. 2d 731, 733 (2d Cir.), *cert. denied,* 382 U. S. 816 (1965). We believe that in this case the possibility of recovering attorney's fees is sufficient stimulus for the enforcement of class rights.

may be some differences in proof of their tying claims, but their interests are precisely the same. Indeed, there are a number of multiple franchisees who took some franchises before and some after November 1, 1970. Neither do we see any significant conflict of interest between the single and multiple franchisees. The latter may have greater damages, but damage issues would in any event be separately tried. Moreover, on the issue of liability, the single and multiple franchisees have precisely the same interest in establishing illegal ties and restrictive covenants so as to give rise to declaratory, injunctive and damage relief.

There is authority, which defendant cites, to the effect that the potentially conflicting interests of present and former franchisees are a sufficient basis upon which to deny class certification (or at least one factor militating against it). *See Bogosian v. Gulf Oil Corp.*, 62 F. R. D. 124 (E. D. Pa. 1973); *Seligson v. Plum Tree, Inc.*, 61 F. R. D. 343, 346 (E. D. Pa. 1973); *Van Allen v. Circle K Corp.*, 58 F. R. D. 562 (C. D. Cal. 1972); *Free World Foreign Cars, Inc. v. Alfa Romeo*, 55 F. R. D. 26 (S. D. N. Y. 1972).[87a] On the other hand, in *McMackin v. Schwinn Bicycle Co.*, 1972 Trade Cas. ¶ 74,220 (N. D. Ill. 1972), *vacated on other grounds*, 1974 Trade Cas. ¶ 75,047 (N. D. Ill. 1974), where Judge McLaren reversed his earlier holding that a hardware store owner whose Schwinn Bicycle franchise had been terminated could represent a class that included more than 6,000 specialized

87a. In *Free World*, Judge Weinfeld found the interests of present and former franchisees to be adverse because of the concern of present dealers that Alfa Romeo remain in business to assure their source of supply as opposed to the sole interest of the plaintiff in that case, a former franchisee, in recovering damages. Judge Weinfeld found the threat to the defendant's survival in the face of the class action suit to be real. Whether or not there is any threat to the survival of Dunkin Donuts here is not known; but in this case the suit is led by *present* franchisees who are active in the Dunkin Donuts franchisee association.

bicycle dealers who were current franchisees, he made it clear that a former franchisee *could* represent a class including present franchisees:

> It should be emphasized that the Court does not adopt the notion that a former franchisee may never represent a class that includes present franchisees. Such a *per se* rule would be counter to the standards and purpose of Rule 23. If, for example, a franchise were terminated on a ground that would violate the antitrust laws and other present franchisees were threatened with similar action, the terminated franchisee could represent the others. Antagonism between the class members would be far less likely under these circumstances.

1974 Trade Cas. at 96,690.

Other cases support the proposition that there is no necessary conflict between present and former franchisees. In *Herrmann v. Atlantic Richfield Co.*, 1975 Trade Cas. ¶ 60,115 (W. D. Pa. 1975), Judge Teitlebaum found no conflict between present and former ARCO lessee dealers in connection with claims of price fixing, price discrimination and tying of TBA, and permitted the matter to proceed as a single class. And, in *In re Clark Oil & Refining Corp.*, 1974-1 Trade Cas. ¶ 74,880 (E. D. Wis. 1974), Judge Reynolds found no conflict between present and former franchisees, certifying a class comprised of both.[88]

It is true that the present Dunkin Donuts franchisees may have more interest in injunctive relief than the past

88. *Cf. Wetzel v. Liberty Mutual Insurance Co.*, No. 74-1515 (3d Cir., Jan. 23, 1975) (where a former employee, assumedly not entitled to reinstatement, was held to be an adequate representative of a class of past and present employees alleging discriminatory employment practices); *Mersay v. First Republic Corp.*, 43 F. R. D. 465 (S. D. N. Y. 1968) (where a plaintiff was permitted to serve as the class representative in a securities act suit even though it is possible that he was personally barred from recovery as an insider).

franchisees in that a favorable decree could require prospective contract changes, conferring relief from company policies which impose burdensome ties, and perhaps modifying the restrictive covenant. (The former franchisees might be concerned with relief from the post-term restrictive covenant.) However, we do not perceive significant differences in the nature of the proof, for the evidence which advances the tying claims of the former franchises is no different from that which advances the tying claims of the present franchisees. The principal object of both present and former franchisees is to secure damages. Our overview detects no antagonism between the interests of the present and former franchisees at this time.[89]

Accordingly, we find that the named plaintiffs will fairly and adequately represent the interest of the class.[89a] However, should conflicts between former and present franchisees arise, we could declare subclasses of present and former franchisees, designating Ungar and Miller, who

89. Possible conflicts may arise if there is selective enforcement of restrictive covenants or adverseness between franchisees who have highly successful stores and marginal operators to whom the presence of a new coffee and doughnut shop in proximity to their franchised outlet may be damaging. These are but possibilities as of now. However, we will be alert to them as the case develops, having in mind the great flexibility to modify and mold afforded by Rule 23.

89a. So that we might adequately assess the potential representative status of the named plaintiffs, we have reviewed their status as franchisees. It appears that all are present franchisees with the following exceptions. Rader is a former franchisee with respect to the Elizabeth, N. J. store, one of his several Dunkin Donuts shops. Similarly, Pallantios, who still has several operating Dunkin Donuts franchisees, is a former franchisee with respect to one shop in Hamilton, N. J. The Olivieris are former franchisees with respect to two of their three shops, in Penn Hills and Versailles, Pa. Finally, Ungar and Miller, while "present" franchisees when their suit was instituted on January 12, 1972, became former franchisees after termination of their franchise agreement in September 1974.

already have separate counsel (and perhaps the Olivieras), as representatives of the former franchisees and the remaining plaintiffs as representatives of the present franchisees. The trial would, in any event, proceed as a single entity with counsel advancing the interests of their respective class clients, but the form of relief, if subclasses were declared, would be molded to accommodate the subclass determination.

E. *Predominance of Common Questions of Fact and Law Over Individual Questions.*

1. Introduction; The Matters of Damages and the Statute of Limitations.

Certification of any class under Rule 23 requires a finding that there are questions of law or fact common to the class. Certification of a § 23(b)(3) class requires the additional finding that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members. By way of explication of this provision, Professor Moore has observed:

> A basic function of the predominance element is to place the questions in the pragmatic context of the new rule, in order to evaluate the contribution which class treatment would make to efficient settlement of the multiparty controversy. To retain this perspective, it has been suggested that the court should ascertain "whether a class action will splinter into individual trials. If this appears likely, common questions do not predominate, and a class action is inappropriate." . . .

3B Moore, *supra* ¶ 23.45[2], at 23-755 (footnotes omitted). What the courts generally look to in evaluating predominance questions is the existence of a "common nucleus

of operative facts." *See, e.g., Siegel I,* 271 F. Supp. 722 (N. D. Cal. 1967), *modified snub nom. Chicken Delight, Inc. v. Harris,* 412 F. 2d 830 (9th Cir. 1969); *Green v. Wolf Corp.,* 406 F. 2d 291 (2d Cir. 1968); *Entin v. Barg,* 60 F. R. D. 108 (E. D. Pa. 1973).

What we now must do, drawing upon and collating our discussions of the law of tying and of the class action discovery, is to: (1) assess the existence (or non-existence) of common questions of law and fact; and (2) decide whether common questions of law or fact predominate over individual questions. Since the predominance finding, according to the court in *Katz v. Carte Blanche Corp.,* 496 F. 2d 747, 756 (3d Cir. 1974), requires "the identification of the legal and factual issues, common and diverse, and an identification of the class members to which those relate," we must make these determinations with respect to each issue. Before commencing this review, however, we must dispose of two contentions which cut across all the issues.

First, defendant claims that, because the damages of each class member will inevitably vary from every other and necessitate individual damage trials, individual issues predominate and militate against certification of a class. Some courts have adopted that view. However, we reject it and believe that the better rule is that summarized by Professor Moore:

> The most frequently recurrent types of suits brought under (b)(3) are private treble-damage antitrust suits, and actions based on various types of securities frauds. In both series of cases, courts as a rule approach the problem of predominance from the point of view of the severability of the issues of liability and damages —whether the asserted statutory violations can be effectively adjudicated in a class proceeding independent from the proceeding in which individual damages would be assessed.

3B Moore, *supra* ¶ 23.45[2], at 23-758 (footnotes omitted). *Accord, Green v. Occidental Petroleum Corp.,* Fed. Sec. L. Rep. ¶ 94,397 (C. D. Cal. 1974); *In re Memorex Security Cases,* 61 F. R. D. 88, 103 (N. D. Cal. 1973); *City of New York v. General Motors Corp.,* 60 F. R. D. 393, 395 (S. D. N. Y. 1973), *appeal dismissed,* 501 F. 2d 639 (2d Cir. 1974). If there is a verdict for the class on liability, we will exercise the option for separate damage proceedings at that time.[90]

Defendant's second contention which cuts across the various issues is that individual questions must predominate since the statute of limitations variously affects the named plaintiffs and, *a fortiori,* the other members of the class. Defendant's attack is essentially threefold. First, to the extent that any franchisee's claim arose more than four years before the commencement of the action, an additional issue is said to be injected as to his claim as compared with more recent franchisees. Second, to the extent that plaintiffs rely on fraudulent concealment to toll the statute, individual issues are said to be necessarily injected as to what each franchisee was told, what he knew and what he could have discovered with due diligence. Third, with respect to the pendent state law claims which may be afflicted with statute of limitations problems, disparate legal issues are said to be involved because of the

90. The damage issues can be tried through the vehicle of separate damage proceedings, *LoCicero v. Humble Oil & Refining Co.,* 52 F. R. D. 28, 30-31 (E. D. La. 1971). Additionally, the separation procedure may be further conducted by using a mater to calculate damages of individual class members. *Brennan v. Midwestern United Life Ins. Co.,* 296 F. Supp. 702, 729-30 (N. D. Ind. 1968); *Connecticut Importing Co. v. Frankfort Distilleries, Inc.,* 42 F. Supp. 225, 226-27 (D. Conn. 1940).

variety of state statutes of limitations governing the various types of claims.

Putative class members whose claims are irretrievably time barred must in due course be excluded from the class, *Wetzel v. Liberty Mutual Insurance Co., No. 74-1515* (3d Cir., Jan. 23, 1975), and denied relief. However, under the doctrine of *American Pipe & Construction Co. v. Utah,* 414 U. S. 538 (1974), the filing of a timely class action complaint commences the action for all members of the class as subsequently determined.

A survey of the class action discovery record suggests that the claims of most plaintiffs are not tinged by a statute of limitations problem. There are some claims of some plaintiffs which may be barred, although in such instances the plaintiffs assert tolling by virtue of the fraudulent concealment doctrine. We agree with Professor Moore who has likened the statute of limitations problem to the damage problem and has pointed out that in private treble damage actions brought under Rule 23(b)(3), courts have "routinely" made provision for separate trials or determinations of damages "in which individual claims and *defenses on statutes of limitation,* reliance, knowledge, etc., can be adjudicated." 3B Moore, *supra* ¶ 23.45[1], at 23-703 n. 13.

Accordingly, we conclude that class action determination is not undermined on predominance grounds by problems that some plaintiffs may have with the statute of limitations. Those problems can be determined in due course in the separate trials on damages, should the case reach that stage.[91]

91. In *Hawkins v. Holiday Inns, Inc.,* C. A. No. C-72-217 (W. D. Tenn., Feb. 3, 1975), Judge McRae, in declaring a class of Holiday Inns franchisees in a suit alleging violations of the Sherman Act and breaches of fiduciary duty, found it inappropriate even to examine the statute of limitations issue in connection with class action determination on the grounds that it was an affirmative defense on which the defendant had the burden of proof.

2. The Antitrust Tying Claims.

It has been plain from the outset of this opinion that its outcome depends mainly on the determination of whether there are common and predominating questions of fact and law pervading plaintiffs' antitrust tying claims. In the ordinary course, this would have to be the most extensive section of this opinion. However, by reason of our extended discussion of the law of tying and our comprehensive review of plaintiffs' claims and the class action discovery, it may be very brief. With the exceptions hereinafter noted, we find that common questions of fact and law exist and predominate in the area of plaintiffs' equipment, sign, real estate and supplier tying claims.[92] This conclusion is premised mainly upon the emergence from the class action discovery of sufficient evidence of Dunkin Donuts' company policy in these areas to provide a *prima facie* substitute for the *Siegel II* express contractual tie. Needless to say, had we accepted rather than rejected the individual coercion doctrine, we could not have made this finding, for individual questions would clearly have predominated. In the absence of the individual coercion doctrine, we find that the principal issues for trial are issues which involve evidence common to the entire putative class. It is important to add that where a company policy emerges, matters of individual exception (and there may be such matters here) will not alter the result. What follows is a summary of the issues for trial with brief comment on the predominance considerations as to each.

a. THE FORMAL REQUISITES OF A TIE.

The first group of issues are those involving proof of the formal requisites of a tie. These are plainly common

92. As will be seen, we do not certify the "used store" claims as defined more precisely below.

issues. The first two requisites—proof of separate tying and tied products, and proof of the requisite economic power in the tying product, *i.e.*, the Dunkin Donuts trademark, logo and franchise system—may be established by a minimum of proof followed by legal argument common to the class.[92a] The third requisite—proof that a not insubstantial amount of commerce has been restrained—may be established by proof of facts common to all the franchisees.

b. PROOF OF USE OF ECONOMIC POWER.

(1) General Conclusions.

We have outlined the ways in which the plaintiffs may prove use of economic power. The first and principal method at issue here is proof of company policy to influence the franchisees to acquire the tied items only from or through Dunkin Donuts. That presents a common issue, both prior to November 1, 1970 (for which period proof is rendered easier by the express equipment tie provision in the contract) and thereafter. Dunkin Donuts has argued forcefully in its brief that the notion of a resolutely enforced company policy is a phantom. Plaintiffs have argued equally forcefully to the contrary. At this juncture (more detailed comment follows), rather than recapitulate the extended class action discovery survey, we note only our conclusion that there is sufficient evidence of company policy to create a *bona fide* issue for trial with respect to the equipment, sign, real estate and supply tie-in claims.

92a. Even if the decision in *Capital Temporaries, Inc. v. The Olsten Corp.*, 365 F. Supp. 888 (D. Conn. 1973), *aff'd*, 1974 Trade Cas. ¶ 75,303 (2d Cir. 1974), see note 24 *supra*, is correct in its assumption that a trademark does not enable the court to presume the requisite economic power in the tying product, the issue of the extent of economic power inhering in the Dunkin Donuts trademark, logo and franchise system would still constitute a common question for trial.

We underscore that we are *not* deciding here the existence or non-existence of such a policy. What we do decide on the basis of our survey is that there is a viable company policy issue for trial and that on that point common questions predominate.

The other means of proving use of economic power, *i.e.*, proof that large numbers of franchisees have accepted a burdensome or uneconomic tie, likewise involves a predominance of common questions. It is a corollary to this conclusion that common questions predominate on the issue of whether Dunkin Donuts conditioned the availability of the franchise on purchase of the tied products.

(2) The Equipment and Sign Ties.

With respect to the equipment and sign ties, we add to the foregoing discussion only that while Dunkin Donuts has indeed established that there were some exceptions to the general practice whereby the franchisees purchased the entire equipment package (and the necessary signs) from Dunkin Donuts, the amount of deviation is not impressive enough to negate the viability of the issue of company policy for trial. As we have already noted, where company policy is established, occasional exceptions will not alter the result. Therefore, we will certify a class on the issue of whether Dunkin Donuts illegally tied its franchise to the sale of new equipment and signs to its franchisees. We will not, however, certify the equipment tie and sign tie claims in those instances where franchisees purchased used and equipped stores from either former franchisees or from Dunkin Donuts.

A more difficult question is posed in the situation where a franchise purchases a new shop which is already equipped at the time of purchase. The plaintiffs suggest the possibility that a franchisor might establish equipped

shops with the conscious purpose of circumventing the law of tying.[93] Were there evidence of such a practice, we would be inclined to certify such a claim. At oral argument, however, the plaintiffs conceded that they had no evidence that this had ever occurred; hence we will make no distinction for new equipped shops in this case, and will not include them within the scope of our class action certification.

(3) The Real Estate Tie.

The threshold question with respect to the plaintiffs' real estate claims is whether they can constitute a tie. We believe that the plaintiffs' contentions that the conditioning of the grant of the franchise upon the franchisee's agreement to lease or sublease from Dunkin Donuts the premises upon which the doughnut shop is to be operated constitute a cognizable tying claim within the traditional framework of § 1 of the Sherman Act.[94] Defendant does not contend otherwise.

Defendant's opposition to class certification here springs principally from its reliance upon the individual coercion doctrine. It buttresses its contentions with the

93. They rely in this regard upon a passage in *Beefy Trail, Inc. v. Beefy King International, Inc.*, 348 F. Supp. 799 (M. D. Fla. 1972), wherein Judge Young indicated that there might be liability:

> . . . under the circumstances where the franchisor by an intentional course of conduct seeks to circumvent the antitrust laws concerning tying arrangements by requiring a franchisee to purchase a restaurant and its equipment previously established with the conscious purpose of avoiding the rationale of *Chicken Delight*.

94. *See, e.g., Halverson v. Convenient Food Mart, Inc.*, No. 70C499 (N. D. Ill., Oct. 31, 1974); *Smith v. Denny's Restaurants, Inc.*, 62 F. R. D. 459 (N. D. Cal. 1974); *Abercrombie v. Lums Inc.*, 345 F. Supp. 387 (S. D. Fla. 1972). These cases, although supportive of the individual coercion doctrine, do seem to assume the viability of a leasing arrangement as constituting a cognizable tied product under the antitrust laws.

statistics reviewed above regarding the number of franchisees who have used their own land for the operation of the franchise store. Plaintiffs argue that, just as with the equipment package, the number of franchisees making their own realty arrangements is small. In view of the evidence thus far discovered and discussed above regarding plaintiffs' claims as to company policy in this area, we believe that common questions exist and predominate. Accordingly, subject to satisfaction of the other Rule 23(b)(3) requirements, we will certify the real estate tie claim.[95]

(4) The Supplier Tie-In Claim—The Quality Control Defense.

In our survey of the class action discovery, we described the conflicting positions of the parties with respect to the alleged supplier tie-in and its countervailing force, the quality control defense. Plaintiffs have asserted that the specifications and standards established by Dunkin Donuts are not only useless, but also a coverup for the receipt of kickbacks from suppliers and a device to limit the suppliers from whom the franchisee may buy. The defendant, citing Dr. Bolaffi's affidavit and other evidence, has argued that its approved supplier procedure is a valid quality control or marketing identity device which constitutes a defense to a tying claim. In addition, however, defendant has asserted that plaintiffs may proceed on their supplier tie-in claim only on an individualized basis;

95. We do not separately certify the plaintiffs' claims with respect to the construction costs markup and the lease override. Dunkin Donuts' alleged overreaching with respect to the construction costs markup may well provide the plaintiffs with an additional item of damage if they succeed on liability. So perhaps may the lease override, although defendant will doubtless argue that that sum is really an additional franchise fee and, therefore, a set off against any tying damages. We need not resolve those issues here.

i.e., that no plaintiff may press the claim unless he can establish that he attempted to purchase from a non-approved vendor and then failed in having the vendor approved as a supplier because of an arbitrary position taken by Dunkin Donuts.

We disagree. We believe that here, as elsewhere, proof of a resolute anticompetitive company policy can carry the day for the plaintiffs. We do not here decide that they have proved such a policy to date; moreover, the quality control defense may indeed prove to be a strong one. However, our survey of the discovery record persuades us that there is a common question for trial which predominates over individual questions in this area. Hence, subject to satisfaction of the other requisites of Rule 23(b)(3), we will certify the supplier tie-in claims (and concomitantly the quality control defense) for class treatment.

3. The Advertising Tying Claims.

The claims of the plaintiff with respect to the advertising fund are essentially twofold in nature. First, plaintiffs allege that the express contractual requirement that the franchisee pay 2% of gross sales into an advertising fund constitutes a tie-in to the sale of the franchise. However, such a claim fails to satisfy the requisite of separate tying and tied products since advertising is inextricably intertwined with the trademark, franchise system and logo as the major vehicle for promoting them. Hence, we will not certify the advertising tie claim as we find that, in the context of this case, advertising is not a separate tied product. *Accord, Kugler v. AAMCO Automatic Transmissions, Inc.*, 460 F. 2d 1214 (8th Cir. 1972).

Plantiffs' second claim with respect to the advertising fund lies essentially in alleged breaches by Dunkin Donuts

of its agreement with the franchisees with respect to the management of the fund. According to the plaintiffs, Dunkin Donuts, in violation of its implied contractual duty to manage the fund to enhance the franchisees' sales, has used the fund for its own benefit.[96] This claim presents questions which are common to the class. Moreover, it appears to present only common factual questions, for what is at issue is how the fund was handled at the Dunkin Donuts' headquarters in Randolph, Mass.

4. The Real Estate Tax Escrow Claim.

As we have seen in our discussion of plaintiffs' class action claims, their real estate tax escrow allegations are principally that Dunkin Donuts has breached a fiduciary duty to maintain the escrow funds in an interest-bearing account for the benefit of each franchisee.[97] Defendant counters that it does not stand in the position of a fiduciary to its franchisees. Alternatively, it asserts that the question of whether or not a fiduciary relationship exists is one involving uncommon questions of fact and law.

The question of whether or not a fiduciary relationship exists between a franchisor and a franchisee is not a simple one. Some courts have held that a franchisor does not stand in a fiduciary relationship to its franchisees. *See, e.g., E. B. E., Inc. v. Dunkin' Donuts of America, Inc.*, C. A. No. 36752 (E. D. Mich., July 24, 1974); *Pollack v. International Industries*, C. A. No. 72-1513-EC (C. D. Cal., Feb. 8, 1973); *Jirna, Ltd. v. Mister Donut of Canada, Ltd.*, 22 D. L. R. (3d) 639 (Ont. Ct. App. 1971). Other courts, given different facts, have held that a fiduciary relationship exists. *See, e.g., Mobil Oil Corp. v. Rubenfeld*, 1973 Trade

96. The manner of alleged misuse is described in detail above. We believe the claim is properly characterized as one for breach of contract rather than breach of fiduciary duty.

97. There was relatively little discovery on this issue.

Cas. ¶ 74,306 (N. Y. Civil Ct. 1972). Moreover, the question of whether a franchisor, even if it is a fiduciary, has a duty to maintain escrow funds in an interest bearing account for the benefit of each franchisee is also difficult.

As we see it, the determination of whether a fiduciary relationship exists and of whether that relationship, once proven, would require the payment of interest on real estate tax escrow funds will require reference to the law of the 34 jurisdictions in which the alleged relationship arose. Accordingly, indivdiual, not common, questions predominate, and class certification of plaintiffs' real estate tax escrow claims must be denied.

5. The Common Law Fraud Claims.

The alleged misrepresentations by Dunkin Donuts about the financial aspects of the business which constitute plaintiffs' common law fraud claims have been detailed in our discussion of plaintiffs' class action claims. It is generally the law of the several states that the elements of a tort cause of action for misrepresentation are the following:

> (1) A representation. (2) Its falsity. (3) Its materiality. (4) The speaker's knowledge of its falsity or ignorance of its truth. (5) His intent that it should be acted on by the person and in the manner reasonably contemplated. (6) The hearer's ignorance of its falsity. (7) His reliance on its truth. (8) His right to rely thereon. (9) And his consequent and proximate injury.

37 C. J. S. *Fraud* § 3 (1943 & Supplement) (footnote omitted). *See also* W. PROSSER, LAW OF TORTS 685 (4th ed. 1971).

A review of these elements and of the limited record on this point makes it apparent that the common law fraud

count raises numerous issues which are personal to each separate plaintiff and are, therefore, uncommon to the class as a whole. *First,* during the years in which Dunkin Donuts has sold franchises, its written promotional materials have varied substantially from time to time and from geographical area to area. Thus, the written representations upon which plaintiffs base their claim have been subject to constant revision due to variations in time and locale. *Second,* variations in oral representations that may have constituted the fraud alleged by plaintiffs add further to individual questions relating to each franchisee. (As averred in the Rosenberg Affidavit, ¶¶ 19, 20, oral representations have varied materially from one salesman to another and, for each salesman, from prospective franchisee to prospective franchisee). *Third,* we are dealing here with the common law, not the antitrust law of tying with respect to which we have rejected the individual coercion doctrine; the common law of fraud requires proof of individual reliance. In sum, because individual, not common issues, predominate with respect to the plaintiffs' common law fraud claims, he will not cerify those claims for class determination.

6. The Restrictive Covenant Claims.

The plaintiffs have asserted claims for relief from in-term and post-term restrictive covenants on both antitrust and common law theories.[98] In the discussion which

98. The relief sought with respect to the restrictive covenants arises under the Declaratory Judgment Act, 28 U. S. C. § 2201 (1959). One of the purposes behind declaratory judgments is to avoid multiplicity and circuity of actions. *Smith v. Transit Cas. Co.*, 281 F. Supp. 661 (E. D. Tex. 1968), *aff'd*, 410 F. 2d 210 (5th Cir. 1969); *Savini v. Sheriff of Nassau County*, 209 F. Supp. 946 (E. D. N. Y. 1962); *Stout v. Grain Dealers Mut. Ins. Co.*, 201 F. Supp. 647 (M. D. N. C. 1962), *aff'd*, 307 F. 2d 521 (4th Cir. 1962). The granting of declaratory relief is proper where the judgment will serve a useful purpose in clarifying and settling the legal relations

follows we will first consider the predominance questions with respect to the in-term antitrust claims, using as our matrix the analysis of Judge Garth in *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 365 F. Supp. 1073 (D. N. J. 1973).[99] We will then deal with the plaintiffs' other restrictive covenant claims. It will be recalled that Judge Garth's first approach to the problem was a traditional Sherman Act § 1 "rule of reason" inquiry into the business justifications for the restraint, the practices generally obtaining in the industry, the precise harm flowing from the restraint and the other considerations summarized by Mr. Justice Brandeis in *Chicago Board of Trade v. United States*, 246 U. S. 231 (1918). Such an undertaking may well be major in scope, but it is one which will involve the trial of questions predominantly common to the class.

Judge Garth's alternative approach was to examine the effect of the non-Holiday Inn clause in an exclusive

98. (Cont'd.)
at issue, or when it will terminate and afford relief from uncertainty, insecurity and controversy giving rise to the proceedings. *Maryland Cas. Co. v. Rosen*, 445 F. 2d 1012 (2d Cir. 1971). Furthermore, declaratory judgments contemplate a pragmatic approach to determination of legal relations in controversy between interested parties. *St. Paul Fire & Marine Ins. Co. v. Aetna Cas. & Sur. Co.*, 357 F. 2d 315 (10th Cir. 1966); *Brunswick Corp. v. Outboard Marine Corp.*, 297 F. Supp. 373 (E. D. Wis. 1969). We are not certain as to whether the defendant wishes to interpose objection to the propriety of declaratory relief. We note at this juncture only that we do *not* resolve that matter, which has not been sufficiently briefed, herein.

99. Plaintiffs also argue that the restrictive covenants are *per se* violations of the Sherman Act under the analysis of *United States v. Topco Associates*, 405 U. S. 596 (1972), due to the existence of Dunkin Donuts' owned "company stores." Thus, they allege that horizontal territoriality is rampant. *Topco*, however, is not applicable here since there is no evidence in the record that the "company stores" are anything more than a temporary device employed by Dunkin Donuts until the location is sold to a new franchisee. Hence, the type of restrictions imposed by Dunkin Donuts in the restrictive covenants are vertical in nature and cannot constitute a *per se* violation of the antitrust laws.

dealing context. *AMI* had contended that the non-Holiday Inn clause was an exclusive dealing arrangement which was justified *prima facie* unless it resulted in anticompetitive effects more substantial than those disclosed by the traditional rule of reason analysis. For purposes of this class certification motion, we must also consider that approach under which plaintiffs must point out the alleged markets (both geographic and product) in which these restraints are unreasonable. According to the defendant, although the complaint alleges a national market in the sale of coffee and doughnut outlets, it cannot be assumed that all class members, or even all plaintiffs, agree with these allegations. For example, the complaint in *Ungar*, defendant states, alleges a separate market exists in each metropolitan area in which defendant does business. Similarly, Dunkin Donuts argues, while some of the plaintiffs would appear to agree that the relevant product market is doughnut shop outlets, others believe that the defendant competes for the sale of its franchises with several other types of franchisors, including other types of fast food outlets, convenience food stores, hardware stores, etc. This uncommonness or conflict in the plaintiffs' claims, defendant argues, is a subject for consideration at trial, making class certification inappropriate.

Defendant does not rest its argument here, but goes on to argue for the non-applicability of a national geographic market. As defendant reasons, there will be significant variation in the amount of foreclosure of a specific geographic market depending on the part of the country being examined. For example, defendant notes that it has many franchised outlets in the Boston area and almost none around Los Angeles or San Francisco; thus defendant's market share is much greater in Boston. Its restrictive covenants could be found dangerous to competition there,

yet acceptable in Los Angeles. Finally, defendant suggests that an examination of the record indicates that it is not at all likely that any individual or multi-unit franchisee would be desirous of establishing a similar business too far away from his home territory. Rather, as a practical matter, defendant asserts, any one franchisee is likely to open new coffee and doughnut shops only in the area surrounding his home base.

In resolving the issue, it must first be noted that in *AMI* Judge Garth posited a nationwide market even though AMI did not have any hotels in the Far West and, as far as the record shows, was not desirous of opening any. Rather, nationwide firms were vying for AMI's business. (Because of the late assertion of the restrictive covenant claim on a class basis here, these matters were not flushed out in class action discovery.) Applying the teachings of *AMI* and the arguments of the parties to the facts at bar, we are inclined to believe that if the evidence developed by discovery or at a pretrial hearing or at trial shows the market to be nationwide, a common issue will be created. In view of the possibility that the actual market will be determined to be doughnut shop franchises, we cannot rule out the possibility that the Dunkin Donuts franchisees bound by the restriction will have a considerable market share that would be subject to foreclosure and, therefore, illegally restrictive of competition under the standards enunciated in *Tampa Electric Co. v. Nashville Co.*, 365 U. S. 320 (1961). Neither can we prematurely reject the assertion, also relevant, that multiple franchisees like Rader and Pallantios would be willing to expand far beyond the geographical area in which they now operate.

We shall not at this time make a determination, binding for trial, as to whether the exclusive dealing approach

is required by the facts. As noted, that determination must abide further discovery and briefing and perhaps a pretrial hearing. Plainly, if the exclusive dealing analogy is applicable and the relevant market is determined to be a series of regional markets, individual questions (analysis of the market for each franchised location) will predominate and class certification will have to be reevaluated as to the in-term antitrust restrictive covenant issue.[100]

The other aspects of the restrictive covenant claims may be briefly disposed of. The post-term clause does not rise to antitrust proportions. Unlike the in-term restraint which is framed in sharp focus by its very breadth, the post-term restraints vary markedly in their impact from franchise site to franchise site, depending upon the character of the area. Trial of the issue would thus necessitate an examination of each franchised location, hence individual questions would predominate.

Viewing the claims, both in-term and post-term, from a common law aspect, they must perforce be judged by state law. The parties have not briefed the choice of law question; however, it appears likely that the question of reasonableness, *vel non*, of a restraint which will operate upon a citizen of a given state and within its borders will be of sufficient importance to the state in question to require that validity of the covenant be measured by that state's laws, notwithstanding the plaintiffs' contention that the law of Massachusetts governs all contractual relationships among the parties. There are about 34 jurisdictions whose laws on restrictive covenants would thus become the standards for judging the validity of the

100. While there is some variation in the terms of the various form agreements used by defendant, the in-term covenants do not vary sufficiently to affect our findings on the certifiability of the antitrust claim.

covenants at issue. Notwithstanding the noble efforts of the drafters of the Restatement of Contracts, § 515 (1932), this area of the law is one in which the states have varied widely. As evidence of this fact, defendant points to two recent cases. *Compare Purcell v. Joyner*, 1973 Trade Cas. ¶ 74,856 (Ga. Sup. Ct. 1973) *with Kenco Chemical & Manufacturing Co., Inc. v. Railey*, 1973 Trade Cas. ¶ 74,834 (Fla. D. Ct. App. 1973). The *Purcell* court refused to enforce a restrictive covenant that prevented competition in designated counties of Georgia, while the court in *Kenco* enforced a restrictive covenant that was without geographical limitation. We cannot embark upon an analysis of the laws of 34 states in this action. Therefore, because individual questions of law as well as fact (*i.e.*, the impact of each covenant given its particular locale) predominate, we cannot certify plaintiffs' common law restrictive covenant claims.

We feel again constrained to note that we have not prejudged the substantive issue (here, restrictive covenants). Defendant asserts that the covenants are valid at common law and under the antitrust laws because they are reasonable and properly tailored to protect legitimate interests of the franchisor and franchisees. What we do here is merely to decide the motion for class determination.

F. *Superiority*.

The final requisite for 23(b)(3) class determination is a finding "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The second sentence of Rule 23(b)(3) goes on to state a number of considerations relevant to the required finding; [101]

101. Actually, the subject considerations are stated to be relevant to predominance as well as superiority, but in the context of

> The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability of or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action.[102]

We do not find the factors mentioned in (A) or (C) to be particularly helpful in resolving the superiority question, but we will deal with (B) and (D), along with other relevant considerations.

In *Katz v. Carte Blanche Corporation*, 496 F. 2d 747 (3d Cir. 1974), the court set forth further guidelines to be followed in deciding the superiority question:

> The superiority finding requires at a minimum (1) an informed consideration of alternative available methods of adjudication of each issue, (2) a comparison of the fairness to all whose interests may be involved between such alternative methods and a class action, and (3) a comparison of the efficiency

101. (Con'td.)
this case we believe them to be more germane to superiority. Hence, we discuss them only here.

102. Professor Moore comments that the second sentence of (b)(3) does not purport to set up a series of factors on which findings must themselves be made:

> Analysis of these various items should not lead to an exaggerated impression of their materiality. None of the suggested factors should be determinative of the grant or denial of class status; they are simply pertinent details to be checked, the presence or absence of which may reflect on the overall wisdom of allowing a class suit. . . .

3B Moore, *supra* ¶ 23.45[4.-0], at 23-851.

> of adjudication of each method. . . . [A]ll Rule 23(b)(3) superiority determinations [must] take into account several different interests. Superiority must be looked at from the point of view of (1) the judicial system, (2) the potential class members, (3) the present plaintiff, (4) the attorneys for the litigants, (5) the public at large and (6) the defendant. The listing is not necessarily in order of importance of their respective interests. Superiority must also be looked at from the point of view of the issues.

496 F. 2d at 757, 760. It is fundamental that a class action enables a large group of claimants to have their disputes adjudicated in a single lawsuit. This is an especially important privilege where the individual claimants lack the resources to pursue the claims on their own. While the class action thus encourages litigation and makes recourse to the courts convenient, the question remains as to whether this result is desirable. The superiority prerequisite thus requires us to determine whether a class suit would be the best or the fairest way of channeling and adjudicating those claims. In this case we believe that it is.

While the *Rader* suit has been brought on behalf of a large number of Dunkin Donuts franchisees, we cannot say that plaintiffs' counsel were disingenuous when they represented to us at the hearing that it was only the prospect of class determination that motivated them to bring the *Rader* suit. In view of the staggering costs of discovery and of ultimate trial, we believe it to be a fair conclusion that without the prospect of a class action, individual claimants would lack sufficient interest or resources to bring a suit such as has been brought here. Such a conclusion has been held sufficient to support a finding of superiority. *See Minnesota v. United States*

Steel Corp., 44 F. R. D. 559 (D. Minn. 1968). Not inapposite is the language of the court in *Weeks v. Bareco Oil Co.*, 125 F. 2d 84, 90 (7th Cir. 1941):

> To permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit practice was to prevent.[102a]

However, even the conclusion that the plaintiffs might proceed on their own in any event does not necessarily militate against class certification. For, as Professor Moore notes, the historic function of the common question suit—to "achieve economics of time, effort and expense, and promote uniformity of decision as to persons similarly situated"—remains a predominant element in the rationale behind Rule 23(b)(3). 3B Moore, *supra* ¶ 23.45[3], at 23-811. Cognizance of these criteria helps produce the conclusion that a class action is superior.

It must be borne in mind that class determination, which imposes binding effect upon all members of the class who do not opt out, can be a great boon to the defendant. For, if the defendant is successful on some or all of the issues presented at trial, as it may well be, it is then significantly protected from repeated and costly litigation all over the country (which seems to have been a

102a. Some cases have held that the larger the individual class member's damages, the less need there is for class treatment, particularly in antitrust actions where the plaintiff can obtain an award of attorneys' fees. *See, e.g., Caceres v. International Air Transport Association*, 46 F. R. D. 89 (S. D. N. Y. 1969), *appeal dismissed*, 422 F. 2d 141 (2d Cir. 1970). While we cannot gainsay that the individual plaintiff's damage claims here may be substantial, so too is the scope of the litigation. When all of the factors here are placed on the balancing scale, it strongly tips towards a superiority finding.

problem for it in recent years).[103] This is an important factor favoring class determination.

Addressing the question from still another aspect, we believe that class treatment is an eminently appropriate vehicle for determining whether a nationwide franchisor in the category of Dunkin Donuts is engaging in anticompetitive practices to the deteriment of it franchisees and competitors. This case in class action form will be massive in scope. However, we do not believe it will be unmanageable. Indeed, in view of the preeminent role of company policy in the case for trial, it would seem that evidence of the manner in which Dunkin Donuts conducted its business with respect to any putative class member would be admissible in the case before us regardless of whether a

103. In addition to the present suits and *E. B. E., Inc. v. Dunkin' Donuts of America, Inc.*, C. A. No. 36752 (E. D. Mich., filed July 24, 1974), we note the existence of four other franchise antitrust actions which have been filed against Dunkin Donuts: *Greene v. Dunkin Donuts, Inc.*, C. A. No. 3-5820-D (N. D. Texas, filed April 26, 1972); *North Carolina ex rel. Robert Morgan v. Dunkin Donuts, Inc.*, No. 73-CVS-2680 (General Court of Justice of Wake County, Superior Court Division, filed Mar. 19, 1973) [also known as *Zezulka*]; *Workman v. Dunkin Donuts, Inc.*, No. 74-173 (E. D. Pa., filed Jan. 23, 1974); *Pasquarello v. Dunkin Donuts, Inc.*, No. 72-1424 (E. D. Pa., filed July 19, 1972). *Greene* was a suit filed on behalf of all present and past franchisees in Texas charging, *inter alia*, monopolization and attempt to monopolize, tying and exclusive dealing, and pending fraud claims. *Zezulka* was an action initiated by the Attorney General of North Carolina seeking injunctive relief under North Carolina's "Little Sherman Act," N. C. GEN. STATS. § 74, for unfair methods of competition and unfair deceptive acts and practices in the conduct of trade. Nine franchisees (one of whom was Zezulka) intervened as a purported class of franchisees. In the action by the franchisees in *Zezulka*, as well as in *Greene*, the courts relied on the individual coercion doctrine to deny class treatment. *Pasquarello* was brought in this court by Messrs. German and Manta, counsel for plaintiff Ungar herein. That case has been dismissed. *Workman* was brought in this court on behalf of a New Jersey franchisee by counsel not connected in any way with the present litigation. The parties have agreed to leave *Workman* in abeyance, pending the outcome of this motion.

class were certified or not. In other words, the evidence might well be the same on the common issues (which comprise the vast bulk of the lawsuit) no matter how many plaintiffs are in the case, rendering this suit in class form weightier than without a class, but not so much weightier as might otherwise be expected.

As we analyze the case in terms of the *Katz* criteria, the alternative methods of adjudication of each class issue are a multitude of duplicative, expensive and time consuming suits. Conversely, the class action approach represents a fair and efficient accommodation of the interests of the plaintiffs, the potential class members, as well as the defendant, which will have the multifarious claims against it adjudicated in one lawsuit. While the litigation will be onerous to this Court and to counsel, the total burden on the judicial system will be less than in the case of a series of protracted suits against the defendant. Finally, we believe the public interest will be served by a class adjudication. As the court of appeals noted in *Hackett v. General Host Corp.*, 455 F. 2d 618, 623 (3d Cir. 1972):

> The chief policy argument in favor of a hospitable attitude toward such class actions is that they tend to reenforce the regulatory scheme by providing an additional deterrent beyond that afforded either by public enforcement or by single-party private enforcement. Viewed in this light the revised Rule 23 may be seen as an extension by the Supreme Court, acquiesced in by Congress, of the deterrent policies of such statutes as § 4 of the Clayton Act.[104]

104. There is a suggestion in portions of defendant's briefs and in some of the recent franchise class action motion opinions, *e.g.*, *Lah v. Shell Oil Co.*, 50 F. R. D. 198 (S. D. Ohio 1970), p. 56 *supra*, that class action certification is generally inappropriate in antitrust cases. Defendant suggests in one of its briefs that, at the very least, class certification is inappropriate in any but horizontal restraint antitrust cases. We find no evidence to support that conclusion.

(footnote omitted). We find the class action form to be superior.

IX. Conclusion.

For the reasons set forth in the foregoing opinion, we will make a class action determination in favor of the plaintiffs and certify for class treatment the following issues: (1) the antitrust tying claims with respect to equipment, signs, real estate and supplies; [105] (2) the contractual claims with respect to the Advertising Fund; and (3) the antitrust claims with respect to the in-term restrictive covenant. Certification of all other claims is denied.

We are satisfied that the named plaintiffs may proceed as representative parties for the class. In accordance with the dictates of *Eisen v. Carlisle & Jacquelin,* 417 U. S. 156 (1974), plaintiffs will bear the costs of the class action notices. We will order counsel for plaintiffs to prepare a

104. (Cont'd.)
The history of class action litigation is heavily laden with antitrust cases. *Siegel,* the benchmark in the franchise field, was a class action case. Although the recent weight of authority in franchise cases is to deny class certification, that is so because of the acceptance of the individual coercion doctrine. Professor Moore points out the appropriateness (and limitations) of class treatment in antitrust cases, 3B Moore, *supra* ¶ 23.45 [2], at 23-759-762. The discussion comes under the heading of predominance, and Professor Moore notes that the question of predominance is "more formidable in the numerous (b)(3) suits based on fraudulent dealings in securities [than in antitrust cases]." *Id.* at 23-762. The recent flurry of class certifications in antitrust cases, cited throughout this opinion, confirms this view. The significant point is that class certification turns not upon whether we are faced with an antitrust case, a securities fraud case, or some other particular area of substantive law, but upon compliance with Rule 23(b)(3).

105. However, we do not certify the equipment and sign tie-in claims in those instances where franchisees purchased used and equipped stores from either former franchisees or from Dunkin Donuts. Neither do we certify equipment and sign tie claims with respect to stores already equipped when purchased from Dunkin Donuts.

proposed form of notice to the class and submit it to counsel for defendant for comment, with a view to submitting a jointly approved form of notice to the Court. We will hold a conference for the purpose of passing upon the form of notice on March 21, 1975, at 11:00 a.m. in chambers.

In accordance with the foregoing opinion, we enter the following Order.

Edward R. Becker
Edward R. Becker, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 72-88

DAVID UNGAR,
JOHN MILLER
and
L-JOLY FOODS, INC.

v.

DUNKIN' DONUTS OF AMERICA, INC.
and
QUINCY ADAMS DONUTS, INC.

CIVIL ACTION NO. 72-1526

JOHN RADER,
BCR DONUT CORPORATION,
RAHWAY DONUT CORPORATION,
GLORIA DONUT CORPORATION,
CRAIG DONUT CORPORATION,
KIMBERLY DONUT CORPORATION,
PETER PALLANTIOS,
PALLAS, INC.,
HARPAL DONUTS, INC.,
FRANKFORD AVE. DONUT CORPORATION,
WEST CHESTER DONUTS, INC.,
JAMES CERAJEWSKI,
WOODMAR DONUTS, INC.,

JOSEPH GIANNUZZI,
NEW DROP DONUTS, INC.,
DICK BURWELL,
BURWELL, INC.,
A & D DONUTS, INC.,
DA-MAREN, INC.
JOSEPH DARATONY,
DARA, INC.,
STEVEN A. HUDOCK,
FORT EMMONS DONUTS, INC.,
ROBERT OLIVIERI,
MICHAEL OLIVIERI,
MARTIN J. OLIVIERI,
PAUL SCARANGELLO,
MARTIN DONUT SHOPS, INC.,
PENN HILLS DONUT SHOPS, INC.,
PAMA INDUSTRIES, INC.,
HAROLD WAINROBER,
D & H DONUTS, INC.,
YOUSEF M. HEGAZI,
SELJO, INC.,
KENNETH SWAHN,
GREG THOMAE, D/B/A BROADWAY DONUTS

v.

DUNKIN' DONUTS, INC.
and
DUNKIN' DONUTS OF AMERICA, INC.

Order.

AND NOW, this 12th day of March 1975, after hearing and upon consideration of the foregoing opinion and the findings contained therein, IT IS ORDERED that:

1. Plaintiffs' prayers for class certification under F. R. Civ. P. 23(b)(3) are granted as to the following issues: (1) the antitrust tying claims concerning equipment, signs, real estate and supplies; [106] (2) the contractual claim with respect to the Advertising Fund; and (3) the antitrust claim with respect to the in-term restrictive covenant.

2. Plaintiffs' prayers for certification under F. R. Civ. P. 23(b)(2) and for all other claims under F. R. Civ. P. 23(b)(3) are denied.

3. The plaintiffs in these actions shall be the representative plaintiffs in the herein certified class action which is to be maintained for a class comprised of all present and former Dunkin' Donuts franchisees.

4. For purposes of identifying the members of the class, defendant within 20 days from this date shall furnish the Court (with a copy to plaintiffs' counsel) a list of names and last known addresses of all those who are either present or former Dunkin' Donuts franchisees as of the date of this Order.

5. Notices shall be sent to each member of the class by first class mail. The expense of preparing, mailing and reproducing such notices to the class members shall be borne by plaintiffs. Plaintiffs shall prepare a proposed form of notice as to the class and submit it to counsel for defendant, with a view to submitting a jointly approved form of notice to the Court. A conference will be held

106. However, we do not certify the equipment and sign tie-in claims in those instances where franchisees purchased used and equipped stores from either former franchisees or from Dunkin' Donuts. Neither do we certify equipment and sign tie claims with respect to stores already equipped when purchased from Dunkin Donuts.

in chambers on March 21, 1975, at 11:00 a.m., for the purpose of passing upon the form of notice.

By THE COURT:

EDWARD R. BECKER,
Edward R. Becker, *J.*

APPENDIX B.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 72-88

DAVID UNGAR,
JOHN MILLER
and
L-JOLY FOODS, INC.

v.

DUNKIN' DONUTS OF AMERICA, INC.
and
QUINCY ADAMS DONUTS, INC.

CIVIL ACTION No. 72-1526

JOHN RADER, ET AL.

v.

DUNKIN' DONUTS, INC.
and
DUNKIN' DONUTS OF AMERICA, INC.

Memorandum and Order Sur Motions for Certification Pursuant to 28 U. S. C. § 1292(b) and for Stay of Order Directing That Notice Be Sent to Members of the Class.

BECKER, *J.* April 8, 1975

I. *Statement of Background Facts.*

On March 12, 1975, we filed a lengthy opinion in the above consolidated franchise antitrust cases pursuant to which we granted plaintiffs' prayers for certification of a class under Fed. R. Civ. P. 23(b)(3) as to the following issues: (1) the antitrust tying claims concerning equipment, signs, real estate and supplies; [1] (2) the contractual claim with respect to the Advertising Fund; and (3) the antitrust claim with respect to the in-term restrictive covenant. We designated the plaintiffs in these actions to be the representative plaintiffs in the certified class action to be maintained for a class comprised of all present and former Dunkin' Donuts franchisees. We further ordered plaintiffs to prepare a proposed form of notice to the class and submit it to counsel for the defendant with a view to submitting a jointly approved form of notice to the Court, and we fixed March 21, 1975, as the date for hearing upon the form of notice.

On Monday morning, March 17, 1975, Alfred H. Wilcox, attorney for Dunkin' Donuts, requested a conference to discuss the matter of an interlocutory appeal, and a conference of the parties was convened on that afternoon. At that time Mr. Wilcox confirmed that he intended to request that we certify our opinion and order for an interlocutory appeal pursuant to 28 U. S. C. § 1292(b). He also expressed concern about his ability to comply with the provision of Rule 5(a) of the Federal Rules of Appellate Procedure which requires the party appealing from an interlocutory order certified for appeal by the District Court to file a petition for permission to appeal within 10 days after certification. Such concern was due to: (1) the breadth and scope of our opinion; and (2) Mr. Wilcox's desire to file a comprehensive statement with the Court of

1. However, we did not certify the equipment and sign tie-in claims in those instances where franchisees purchased used and equipped stores from either former franchisees or from Dunkin' Donuts. Neither did we certify equipment and sign tie claims with respect to stores already equipped when purchased from Dunkin' Donuts.

Appeals. Mr. Wilcox thereupon requested that consideration of the form of class action notice and its dissemination be deferred so that he could devote full time to his § 1292(b) application. He further expressed the view that it would be improper to create expectations and attitudes in potential class members via an official notice before the Court of Appeals had opportunity to consider the question.

After hearing the view of both sides on the § 1292(b) question, we indicated our tentative intention to grant the § 1292(b) certification. We thereupon stated that if defendant would submit its request for a § 1292(b) certification on Wednesday, March 19, and if plaintiffs would submit their opposing papers on Friday, March 21, we would rule on Monday, March 24. The 10 days provided by Rule 5(a) would thus commence on March 24, assuming we were to certify the interlocutory appeal. Concomitantly, we stated that if that timetable were followed, we would defer consideration of the class notice question until the week of March 31, 1975, thus allowing Mr. Wilcox time to devote to his § 1292(b) petition to the Court of Appeals. Alternatively, someone (we cannot recall if it was a member of plaintiffs' or defendant's group of counsel) suggested that Mr. Wilcox be granted as much time as desired to prepare his petition to the Court of Appeals, in which event the class notice questions could then be disposed of promptly, as contemplated by our original opinion and order. Mr. Wilcox assented to this suggestion,[2] and the parties proceeded accordingly.

Counsel for the parties promptly met to discuss the form of notice, but were unable to reach an agreement. We held conferences with the parties on March 21, March 22 and March 23 to consider the form of notice and the matter of a class (non) communication order. The parties

2. The raison d'être of this assent is a matter of dispute which will be discussed, *infra*.

continued to express widely disparate views. In due course we fashioned and promulgated: (1) a form of class action notice; (2) an order directing counsel to distribute notice; and (3) an order re communication with class members.[3] Copies of each of the orders are attached to this memorandum; (the class notice is affixed as an exhibit to the order directing counsel to distribute notice).

During the course of our discussions with counsel respecting the class action notice and noncommunication order, Mr. Wilcox expressed his concern about the danger of the withholding of payments to his client by the franchisees. We responded by inserting the following paragraph in the class notice:

> No action taken by the Court, in connection with the class action determination, frees you from paying any rents, royalties, advertising fees or any other monies due under the terms of any agreements which you signed with Dunkin' Donuts or its subsidiaries.

In fairness to Dunkin' Donuts, we also inserted in the class action notice a paragraph which stated:

> If you are a former franchisee who has signed a release or vacated his shop leaving sums allegedly due to Dunkin' Donuts, you are notified that Dunkin' Donuts has informed the Court that it may assert these claims against you if you decide to be a member of the class.

Counsel for both sides expressed grave concern about potential communications with franchisees on the matter of whether or not to opt out of the class. All parties acknowledged that the Court's class certification opinion had

3. This order replaces an earlier and less comprehensive noncommunication order.

received widespread publicity and was known to many franchisees throughout the nation. Each side recited instances of alleged improper solicitation which had already occurred; the plaintiffs asserted improper conduct by Dunkin' Donuts franchise salesmen and zone managers, and the defendant claimed that there was improper solicitation by the officers of the franchisees association, some of whom were not party plaintiffs. In response to these concerns, we wrote a preamble to our noncommunication order which stated:

> The Court has determined to enter this Order so as to insure that the members of the class in this action are not subjected to improper persuasion or influence and are, therefore, given a fair and adequate opportunity to make an independent decision as to whether or not to opt out of the class determined by the Court's Order of March 12, 1975.

Moreover, in addition to the usual terms of a class communication order requiring prior approval of the Court for any communication by named plaintiffs or officials of defendant or any of their counsel,[4] we inserted three supplementary provisions to assuage the fears of counsel and for prophylactic effect:

> Should any class member initiate such a discussion [about the merits of class members' decisions of whether or not to opt out of the class action or the merits of any part of the litigation] with any employee, agent, or counsel of either defendant or named plaintiff, such employee, agent or counsel must respond to the effect that he or she is prohibited from discussing these matters and that they are in the hands of the Court.

4. *See Manual for Complex Litigation*, appendix § 1.41 (1973).

> Defendants, its employees, agents or counsel are forbidden, without prior approval of the Court, from communicating, directly or indirectly, orally or in writing, any basic revision in company policy concerning the franchisees to any member of the class.[5]
>
> It is the desire of this Court that members of the Consolidated Franchisees Association shall not attempt to influence or persuade franchisees concerning their decision whether or not to opt out of the aforesaid class.[6]

We provided that the noncommunication order was to be reconsidered after 90 days, by which time it was expected that the critical opt out preiod would have passed.

As our first act under the noncommunication order, we approved a letter to be sent by Robert Rosenberg, President of Dunkin' Donuts, to each present franchisee, a copy of which is attached to this memorandum. Mr. Rosenberg's letter reminds the franchisees of their mutual interest in improving the Dunkin' Donuts system and exhorts all concerned to work hard to improve the profitability of each Dunkin' Donuts shop.

On April 2, 1975, Mr. Wilcox informed us that he would present on that day his application for § 1292(b) certification, further representing that by dint of Herculean labors he would be ready within 10 days for the Court of Appeals. Since the class action notices had not yet been sent (although they were almost ready for mailing), he also submitted an application to stay their mailing. For the reasons set forth in this memorandum, we will grant

5. This language was intended to avoid blandishments by the franchisor constituting a veiled inducement to the franchisee to opt out.

6. This was precatory language appealing to the sense of fairness of members of the Association who were not party plaintiffs and, hence, not amenable to the Court's order.

the application for § 1292(b) certification but deny the application for stay of our order directing that notice be sent to members of the class.

II. *Certification Under 28 U. S. C. § 1292(b).*

28 U. S. C. § 1292(b) permits appeal of an interlocutory order, in the discretion of the Court of Appeals, only where the District Judge certifies that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from such order may materially advance the ultimate termination of the litigation. The certifiability under 28 U. S. C. § 1292(b) of a District Court's class certification order is established by *Katz v. Carte Blanche Corporation,* 496 F. 2d 747 (3d Cir. 1974). However, it is plain that not every such order should be certified.[7] As the Court noted in *Milbert v. Bison Laboratories, Inc.,* 260 F. 2d 431 (3d Cir. 1958):

> It is quite apparent from the legislative history of the Act of September 2, 1958 that Congress intended that § 1292(b) should be sparingly applied. It is to be used only in exceptional cases where an intermediate appeal may avoid protracted and expensive litigation and is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation.

26 F. 2d at 433. The District Judge thus has a responsibility to an already overburdened Court of Appeals not to certify blithely. We have an extra responsibility in this

7. We denied § 1292(b) certification to the grant of a class in *Entin v. Barg,* 60 F. R. D. 108 (E. D. Pa. 1973), a Securities Act case. Plaintiffs in their memorandum have cited, in addition to *Entin,* a number of antitrust cases where the District Judge refused § 1292(b) certification after having certified a class.

case, having written a 158 page opinion which the Court will have to consider in addressing the certification.

The major thrust of our opinion lies in its rejection of defendants' contention that, in the absence of an overt contractual tie,[8] an unlawful tying arrangement in a franchise context cannot be established without evidence of individual coercion, i.e., proof of such events and circumstances surrounding the relationship between the franchisor and each franchisee as will demonstrate that the franchisee was coerced into agreeing to an anticompetitive tie. Were we to have followed that doctrine, espoused by a number of other District Courts, individual rather than common issues may well have predominated, barring class certification of the tying issues. Instead, after a wide ranging analysis of the law of tying, we set forth our conclusions as to the cognizable means of proving use of economic power requisite to establishment of an unlawful tie in lieu of establishing (individual) coercion. The area in which we have written is an increasingly important, yet relatively uncharted, area of the law. The few guideposts that do exist stem from District Court opinions. We thus recognize that some may view a § 1292(b) certification here as a District Judge's effort to draw the Court of Appeals into a given case prematurely in an endeavor to obtain future guidance for himself and other District Judges in cases of this general character. Acceptance of the appeal would, of course, eventuate in such welcome guidance, but that is not (and cannot be) the basis for our decision. We will certify because we believe that the three criteria for § 192(b), certification are met here, and that this is one of

8. *Cf. Siegel v. Chicken Delight, Inc.,* 271 F. Supp. 722 (N. D. Cal. 1967), *modified sub nom. Chicken Delight, Inc. v. Harris,* 412 F. 2d 830 (9th Cir. 1969); 448 F. 2d 43 (9th Cir. 1971), *cert. denied,* 405 U. S. 955 (1972).

those "exceptional" cases in which such certification is appropriate.[9]

Milbert talks of protracted and expensive litigation being avoided by interlocutory appeal. This is, of course, enormously protracted and expensive litigation, as are most antitrust class action cases. It would also be protracted and expensive with its fifteen plaintiffs and without a class. However, though we have noted in our main opinion (because of the nature of proof involved with or without a class action) that this suit in class form is not so much weightier than would ordinarily be expected, that does not mean that there will not be a greater delay and expense attendant to the class form, particularly in the discovery phase. And, of course, added time of the District Court must be committed to a class action proceeding. Moreover, and equally important, uncertainty over the propriety of our class certification inhibits settlement negotiations. We have the impression that until Dunkin' Donuts has had the opportunity to challenge our analysis of the law of tying and our class certification in the Court of Appeals, settlement will be impossible, and if that opportunity does not come until after trial, it will be too late to settle the case. We believe that this concatenation of factors satisfies the third requirement of § 1292(b), which is that an immediate appeal would materially advance the ultimate termination of the litigation.

Turning back to the first requisite of § 1292(b), the matter of a "controlling question of law", we believe that such a question exists here on two levels. The matter of class certification itself is "serious to the conduct of the litigation", both practically and legally. *See Katz v. Carte*

9. We note that were we to refuse certification, mandamus would be unavailable because we would have acted within our jurisdiction, pursuant to appropriate procedural safeguards and in a nonarbitrary manner. *See Solomon v. Continental American Life Insurance Company*, 472 F. 2d 1043, 1046 (3d Cir. 1973).

Blanche Corp., 496 F. 2d at 755. On the practical level, a number of factors held cognizable by the Court in *Katz* are present here: (1) the expense to the litigants of discovery on the merits of a class action and of trial of such an action; (2) inhibition of potential settlement caused by uncertainty as to the propriety of class certification; and (3) the saving of time of the District Court. However, even if we were to focus solely upon the legal questions and posit that a "controlling question" does not exist when the sole issue is whether the factual complex of a given case meets the class action requirements of Rule 23,[10] we would find a controlling question here—that is, the propriety of our rejection of the individual coercion doctrine and the correctness of our resultant conclusions (following some 75 pages of discussion of the antitrust law of tying) as to the requisite proof to establish conduct constituting an illegal tie. As we have indicated, our finding of predominance of common questions, essential to determination of the class, was in large measure a function of our conclusion concerning the requisite proof to establish an illegal tie.

While we believe that the conclusions in our opinion regarding the law of tying were correct, the opinion also reflects a rejection of the views of many other District Court Judges who have adopted the individual coercion doctrine. Although we believe we have demonstrated that the individual coercion doctrine initially evolved from a misreliance on certain cases and have also demonstrated that it cannot be maintained in the face of the Supreme Court's decision in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134 (1968), the presence of these differing District Court opinions requires that we declare that there is "substantial ground for difference of

10. *See Katz v. Carte Blanche Corp.*, 496 F. 2d 747, 770 (3d Cir. 1974) (Aldisert, J., dissenting).

opinion" as to the correctness of our decision. The remaining requirement for § 1292(b) certification is, therefore, met.

III. *Stay of Order Directing That Notice Be Sent to Members of the Class.*

The gravamen of defendant's motion for stay of the class action notices lies in its assertion of harm which will befall it should a notice be sent. In defendant's view:

> The sending of notice that the court has determined that the action shall proceed on a class basis with respect to the issues described in the court's order and in the form of notice approved by the court creates a substantial risk that franchised operators will misconstrue or seize upon the Notice and refrain from making payments to Dunkin' Donuts on a timely basis, or engender in those franchised operators a disregard for their obligations to Dunkin' Donuts and to the public concerning the conduct of their business under Dunkin' Donuts' tradename and mark.
>
> If the Court of Appeals is to have an opportunity to act before the present status quo is disturbed, the order directing the sending of notice must be stayed; otherwise the Court of Appeals will be presented with an accomplished fact insofar as the creation of expectations and skewing of attitudes is concerned.

We disagree.

First, we believe that the form of class action notice which we have devised, the relevant terms of which are recited above, more than amply protects defendant from potential harm. There is no risk under the Court's notice that the franchised operators will seize upon the notice and

refrain from making payments to Dunkin' Donuts on a timely basis because the notice makes plain that their obligations to make timely payments are unaffected by the Court's order. Indeed, we believe that *failure* to send such notice at this time would create an even greater risk of harm to the defendant and, in any event, would be unwise. As we have noted, there has been widespread publicity about the Court's order. There may be considerable delay before the Court of Appeals can act upon a case of this magnitude, a delay which will be augmented by a petition for certiorari which defense counsel has indicated he will file if unsuccessful. In the absence of a prophylactic notice such as we have decreed, there is a far greater danger that ill-intentioned individuals will seize upon the knowledge of class certification and refrain (and induce others to refrain) from making timely payments. Furthermore, defendant errs in suggesting that the class action notice will disturb the status quo; in defendant's parlance, the "status quo" was disturbed by the Court's class certification order which was widely disseminated by the media and word of mouth. Only the class notice, representing a neutral explication by the Court of the present state of affairs, can engender an equitable balance.

In sum, we believe that the proposed notice is a fair one and that in conjunction with the noncommunication order and the Rosenberg letter, the rights of all will be preserved. If our class certification is heard and reversed, the relief the defendant seeks will have been accomplished. We conclude that the spirit of Rule 23 requires that the notices be sent and that the application for stay be denied, and we will so order.[11] However, inasmuch as counsel for

11. We decline to deny the motion for stay on the grounds, vigorously asserted by plaintiffs, that the defendant, having obtained time to prepare its § 1292(b) motion by agreeing that the class notice be sent in the interim, has "welshed on a deal". Al-

Dunkin' Donuts has indicated his intention to seek a stay of the mailing from the Court of Appeals, we strongly suggest that the mailing of the notices be deferred until the Court of Appeals has had an opportunity to consider the stay application.

In consideration of the foregoing memorandum, we enter the following Order:

/s/ Edward R. Becker
Edward R. Becker, *J.*

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11. (Cont'd.)
though we cannot recall whether it was Mr. Wilcox or counsel for the planitiffs who suggested that arrangement, we accept Mr. Wilcox's representation that he acceded to it only for lack of what he felt to be a proper and viable alternative. Moreover, we note that even at the time we entered our order directing that the notice be sent, Mr. Wilcox objected to the sending of notice.

IN THE
UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Civil Action No. 72-88

DAVID UNGAR,
JOHN MILLER
and
L-JOLY FOODS, INC.

v.

DUNKIN' DONUTS OF AMERICA, INC.
and
QUINCY ADAMS DONUTS, INC.

Civil Action No. 72-1526

JOHN RADER, et al.

v.

DUNKIN' DONUTS, INC.
and
DUNKIN' DONUTS OF AMERICA, INC.

Order.

And Now, this 8th day of April, 1975, after hearing, it is Ordered that:

(1) The Opinion and Order of March 12, 1975, is amended to include the following statement:

This Opinion and Order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal may materially advance the ultimate termination of litigation.

and;

(2) The motion of defendant that the Court's prior Order directing that notice be sent to class members be stayed is DENIED.

By THE COURT:
/s/ EDWARD R. BECKER
Edward R. Becker, *J.*

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C. A. Misc. Record No. 75-8089
DAVID UNGAR, ET AL.,
Respondents
v.

DUNKIN' DONUTS OF AMERICA, INC., ET AL.,
Petitioners

C. A. Misc. Record No. 75-8090
JOHN RADER, ET AL.,
Respondents
v.

DUNKIN' DONUTS OF AMERICA, INC., ET AL.,
Petitioners

Present: VAN DUSEN, ADAMS and GARTH, *Circuit Judges.*

Order.

It is ORDERED that (1) respondents' motion to strike petitioners' reply in support of its 28 U. S. C. § 1292(b) petition is granted; and (2) PETITION FOR INTERLOCUTORY APPEAL, filed April 18, 1975, is granted.

Judge Garth votes to deny the Petition for Interlocutory Appeal for the reasons stated in the attached dissent.

By THE COURT:
VAN DUSEN
Circuit Judge

Dated: May 7, 1975

Dissent From Grant of Leave to Appeal Pursuant to 28 U. S. C. § 1292(b).

GARTH, *Circuit Judge*, dissenting:

I disagree with the members of the panel who have granted leave for § 1292(b) interlocutory appeal of the class action order. There are a number of reasons why I record my dissent.

Preliminary, I note that the district court has filed an opinion and order of 158 pages granting a motion for class action determination under Fed. R. Civ. P. 23 in the context of consolidated anti-trust suits brought against the defendants by 14 present and former franchisees. In the course of its opinion the district court dealt with not only the factors to be considered in a class action motion, but also with various substantive underlying anti-trust claims. As I note below, certain of the substantive issues were not included for class certification. In a subsequent opinion and order dated April 8, 1975 which contained the requisite certification under 28 U. S. C. 1292(b), the district court itself recognized that the major thrust of its 158 page opinion was its rejection of defendants' "individual coercion" argument.

The reasons for my dissent are:

1. Since *Katz v. Carte Blanche Corp.*, [496 F. 2d 747 (3d Cir. 1974) (en banc)] was decided, it has been my impression that as a matter of policy we have almost uniformly refused to accept interlocutory appeals from the grant or denial of class actions in ordinary litigation. Hence, I think that granting leave to appeal where a class action has been determined establishes an unfortunate precedent for this Court which will result in our being deluged with applications for certification every time the district court has certified or refuses to certify a class action. As I understand the purpose of § 1292(b) certification, it is to avoid the possibility of protracted and expensive litigation. It is not designed to "open the flood-gates" for review of interlocutory orders in cases that may contain difficult rulings. *Milbert v. Bison Laboratories, Inc.*, 260 F. 2d 431, 433 (3d Cir. 1958); *see United States Rubber v. Wright*, 359 F. 2d 784, 785 (9th Cir. 1966). In still other contexts we have expressed our displeasure with piecemeal appellate litigation. *United States v. Estate of Pearce*, 498 F. 2d 847 (3d Cir. 1974) (en banc) (appeal dismissed from denial of motion to quash a sequestration order); *Borden Company v. Sylk*, 410 F. 2d 843 (3d Cir. 1969) (appeal dismissed from a discovery order compelling disclosure).

2. The order of March 12, 1975 certfiying the class was careful to limit certification to only certain of the issues. (Footnote 1 to the district court's April 8, 1975 Memorandum and Order Sur Motion for Certification, Civ. No. 72-88/1526 recites those claims which were not certified for class action). The major issue, if not the only issue, seriously contested by the defendants as it appears in a class setting and on which review is sought, is the district court's rejection of the defendants' contention that:

> ". . . in the absence of an overt contractual tie, an unlawful tying arrangement in a franchise context cannot be established without evidence of individual coercion, i.e., proof of such events and circumstances surrounding the relationship between the franchisor and each franchisee as will demonstrate that the franchisee was coerced into agreeing to an anticompetitive tie."

Opinion of the district court, *supra* at 7. (Footnote omitted). The district court's rejection of that argument at this

preliminary stage does not prevent its subsequent reconsideration by the district court at a later stage and upon a *complete* record. It is during the development of a complete record that the district court is in the best position to determine whether individual issues predominate over common issues. Certainly, the trial court if on such reconsideration determines that individual issues do predominate over common issues as is urged by the defendants, it can in its discretion decertify the class at an appropriate time during the litigation and before final judgment. At the very least, we as a reviewing Court, would be in a far better position to evaluate the propriety of class certification after such a record has been established.

3. To the extent that defendants claim that notice to class members of the class certification will prejudice their position, I note that despite the defendants' endeavors to stay such notice, the class notices were sent to current franchisee class members on April 11, 1975. (Respondents' Memorandum in Opposition to Defendants' Petition at 3).

4. I am not persuaded by the argument that because the trial court has seen fit to certify under 28 U. S. C. § 1292(b) (Order April 8, 1975) that we should for that reason accept this appeal. Trial court certification is a condition precedent to our granting a petition for interlocutory appeal. It by no means can deprive us of our discretion in granting or denying the appeal. Our discretion has been said to be similar to that of the Supreme Court with respect to its certiorari discretion. *Katz v. Carte Blanche Corp., supra,* at 754. Our denial of permission to appeal may not only be based upon a different evaluation than that of the district court, but may be for entirely unrelated reasons, such as our congested appellate

docket, our displeasure with piecemeal litigation, or our desire to have a full record before considering disputed, complex issues.

I would thus deny the petition for leave to appeal pursuant to § 1292(b).

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 75-1625 and 75-1626

DAVID UNGAR, JOHN MILLER and
L-JOLY FOODS, INC

v.

DUNKIN' DONUTS OF AMERICA, INC. and QUINCY ADAMS DONUTS, INC. c/o C. T. CORPORATION,
Appellants in No. 75-1625

(D.C. Civil No. 72-88)

JOHN RADER, an individual; BCR DONUT CORPORATION, a New Jersey Corporation; RAHWAY DONUT CORPORATION, a New Jersey Corporation; CLORIA DONUT CORPORATION, a New Jersey Corporation; CRAIG DONUT CORPORATION, a New York Corporation; KIMBERLY DONUT CORPORATION, a New York Corporation; PETER PALLANTIOS, an individual; PALLAS, INC., a New Jersey Corporation; HARPAL DONUTS, INC., a Pennsylvania Corporation; FRANKFORD AVE. DONUT CORPORATION, a Pennsylvania Corporation; WEST CHESTER DONUTS, INC., a Pennsylvania Corporation; JAMES CERAJEWSKI, an individual; WOODMAR DONUTS, INC., an Indiana Corporation; JOSEPH GIANNUZZI, an individual; NEW DORP DONUTS, INC., a New York Corporation; DICK BURWELL, an individual; BURWELL, INC., a Michigan Corporation; A & D DONUTS, INC., a

Michigan Corporation; DA-MAREN, INC., a Michigan Corporation; JOSEPH DARATONY, an individual; DARA, INC., a Michigan Corporation; STEVEN A. HUDOCK, an individual; FORT EMMONS DONUTS, INC., a Michigan Corporation; ROBERT OLIVIERI, MICHAEL OLIVIERI, MARTIN J. OLIVIERI, and PAUL SCARANGELLO, individuals; MARTIN DONUT SHOPS, INC., a New Jersey Corporation; PENN HILLS DONUT SHOPS, INC., a Pennsylvania Corporation; PAMA INDUSTRIES, INC., a Pennsylvania Corporation; HAROLD WAINROBER, an individual; D & H DONUTS, INC., a Massachusetts Corporation; YOUSEF M. HEGAZI, an individual; SELJO, INC., a Michigan Corporation; KENNETH SWAHN, an individual; GREG THOMAE, an individual d/b/a BROADWAY DONUTS

v.

DUNKIN' DONUTS, INC., a Delaware Corporation and DUNKIN' DONUTS OF AMERICA, INC., a Massachusetts Corporation,
Appellants in No. 75-1626

(D.C. Civil No. 72-1526)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 11, 1975

Before: ALDISERT, HUNTER and GARTH, *Circuit Judges.*

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OPINION OF THE COURT

(Filed March 3, 1976)

ALDISERT, *Circuit Judge.*

This appeal from a plaintiff class certification of claims brought under § 1 of the Sherman Act, 15 U. S. C.

§ 1,[1] alleging illegal tie-in sales, arises from two consolidated actions by franchisees against their franchisor, Dunkin' Donuts of America, Inc. The district court decided that it was not necessary for each franchisee to prove that he individually was coerced by the franchisor to accept the allegedly tied items; rather it would be sufficient if the franchisees as a group could prove either that the franchisor had a policy to persuade the franchisees to accept the allegedly tied items, or that a large number of franchisees had, in fact, accepted them. Based on this view of the required proof, the district court concluded that common questions would predominate over individual ones and certified a class under Rule 23(b)(3), F. R. Civ. P.[2] This interlocutory appeal, challenging the propriety of these rulings, was requested by the district court under 28 U. S. C. § 1292(b) [3] and was permitted by a divided panel

1. § 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, . . .

2. *23(b) Class Actions Maintainable*. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . .

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

3. § 1292

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of

of this court by order of May 7, 1975. We conclude that the alternative modes of proof which the district court deemed sufficient cannot substitute for proof by each franchisee that he, individually, was coerved to accept the alleged tie-in sales. Accordingly, the class certification—expressly premised on the district court's contrary view—cannot stand. The district court opinion is reported at 68 F. R. D. 65 (E. D. Pa. 1975).

I.

Adversaries will always differ as to the propriety of the grant or denial of class certification and it is to be expected that litigants and district judges may often desire immediate review of that decision. However, this court has taken a strong position that a class certification decision, per se, is not an appealable final order under 28 U. S. C. § 1291. *Hackett v. General Host Corp.*, 455 F. 2d 618 (3d Cir.) *cert. denied*, 407 U. S. 925 (1972). To qualify for interlocutory review in this circuit a class certification decision must be attended by special factors which take it outside the ambit of the general rule. *Katz v. Carte Blanche Corp.*, 496 F. 2d 747, 756 (3d Cir.), *cert. denied*, 419 U. S. 885 (1974).

The proceedings in the district court were not cursory. The court heard oral argument on the request for class

3. (Cont'd.)

the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Proivded, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

See *Interlocutory Appeals in the Federal Courts Under 28 U. S. C. § 1292(b)*, 88 Harv. L. Rev. 607 (1975).

status in March, 1974. Almost a year later it rendered its decision in a 155 page opinion. In a second, 11 page, opinion, setting forth the § 1292(b) criteria, the district court wrote:

> [A controlling question of law] exists here on two levels. The matter of class certification itself is "serious to the conduct of the litigation", both practically and legally. *See Katz v. Carte Blanche Corp.*, 496 F. 2d at 755. On the practical level, a number of factors held cognizable by the Court in *Katz* are present here: (1) the expense to the litigants of discovery on the merits of a class action and of trial of such an action; (2) inhibition of potential settlement caused by uncertainty as to the propriety of class certification; and (3) the saving of time of the District Court. However, even if we were to focus solely upon the legal questions and posit that a "controlling question" does not exist when the sole issue is whether the factual complex of a given case meets the class action requirements of Rule 23, we would find a controlling question here—that is, the propriety of our rejection of the individual coercion doctrine and the correctness of our resultant conclusions (following some 75 pages of discussion of the antitrust law of tying) as to the requisite proof to establish conduct constituting an illegal tie. As we have indicated, our finding of predominance of common questions, essential to determination of the class, was in large measure a function of our conclusion concerning the requisite proof to establish an illegal tie.
>
> While we believe that the conclusions in our opinion regarding the law of tying were correct, the opinion also reflects a rejection of the views of many other District Court Judges who have adopted the individual coercion doctrine. Although we believe we have demonstrated that the individual coercion doctrine initially evolved from a misreliance on certain cases and have also demonstrated that it cannot be maintained in the face of the Supreme Court's decision in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134 (1968), the presence of these differing District Court opinions requires that we declare that there is "substantial ground for the difference of opinion" as to the correctness of our decision.

App. at 185a-86a (footnote omitted).

We doubt that this interlocutory appeal would have been accepted by this court had it not involved the question of the district court's rejection of the doctrine of individual coercion. Accordingly, the focus of our discussion will be on the propriety *vel non* of that rejection.

II.

Dunkin' Donuts began as a small chain of company owned coffee and doughnut shops in New England. Today it is the largest coffee and doughnut franchising system in the country. By 1975—20 years after Dunkin' Donuts began franchising its operation—more than 700 shops dotted the United States, most of them franchises.

Typically, Dunkin' Donuts provides its franchisees with a "turn-key" operation. It selects suitable sites for doughnut shops and either purchases or leases them. It builds a doughnut shop, and offers the prospective franchisee a lease on the land and building. It also offers to sell him the equipment needed to operate the shop. Appellant contends that it is this package deal aspect of the franchise that often attracts the prospective franchisee: the new businessman has only to turn the key, and he is in business. Dunkin' Donuts does not manufacture or sell the

products, or the ingredients of the products, sold in the shops. Rather, to assure uniform quality of products sold under the trademark, Dunkin' Donuts maintains a quality control system for the most important supplies used in the operation, and supervises an approved supplier system as to those supplies.

Two actions, seeking damages as well as declaratory and injunctive relief, were filed in 1972 against Dunkin' Donuts by 14 of its present and former franchisees. One action, *Ungar*, arises under franchise agreements signed before November 1, 1970, the date Dunkin' Donuts changed its franchise agreement form. The other, *Rader*, arises under franchise agreements signed after that date. The actions were consolidated below; insofar as this appeal is concerned, the plaintiffs do not rely on the terms of their franchise agreements. We treat the two actions as one.

The claims asserted against Dunkin' Donuts were wide-ranging, including counts based on violations of the antitrust,[4] patent and securities laws, as well as counts alleging fraud, breach of fiduciary duty, breach of contract and tortious interference with business expectations. Class action status was sought with respect to most, but not all, of the claims; the proposed class consisted of all present

4. Plaintiffs originally asserted tying claims under Section 3 of the Clayton Act, 15 U. S. C. § 14, as well as under Section 1 of the Sherman Act, but withdrew them because it was agreed that the tying item here, the Dunkin' Donuts trademark, franchise system and logo, was not "goods, wares, merchandise, machinery, supplies, or other commodities" as required by Section 3. The district court decided, however, that the trademark, system and logo did constitute a separate tying product sufficient for purposes of the Sherman Act. We do not consider that decision an obvious one. *See, e.g., Redd v. Shell Oil Co.*, No. 74-1800 (10th Cir., filed Nov. 3, 1975) (Shell trademark "cannot be considered as a 'product' "). *But see, Susser v. Carvel Corp.*, 332 F. 2d 505 (2d Cir. 1964), *cert. dismissed*, 381 U. S. 125 (1965) (refusing to treat a franchise system as involving a single unified product). However, the decision is not under review on this interlocutory appeal; accordingly, we express no opinion on it.

and former franchisees, a group estimated to number over 600. The district court certified a class as to three aspects of the case only: "(1) the antitrust tying claims with respect to equipment, signs, real estate and supplies; (2) the contractual claim with respect to the Advertising Fund; and (3) the antitrust claims with respect to the in-term restrictive covenant." 68 F. R. D. 150 (footnote omitted). The class certification was only on the issue of liability. The district court reserved the question of damages, and the question whether certain individual claims were barred by the statute of limitations, for a separate proceeding should liability be established.

Neither side has briefed the issue of class certification of the Advertising Fund claim; both sides have briefed the issue of certification of the in-term restrictive covenant claim. The district court's § 1292(b) certification does not include either of those issues. The sole question presented on this appeal is the propriety of class certification of the antitrust tying claims, which question subsumes review of the district court's conclusions as to the proof requisite to establish an illegal tie-in.

Summarized, it was appellees' contention that Dunkin' Donuts had a policy of granting a license to use its trademark only on the condition that the licensee accept certain other items from Dunkin' Donuts, and that this practice constituted a tying arrangement illegal under the antitrust laws. Specifically, appellees contended that four kinds of items were illegally tied to the trademark: real estate, equipment, signs and supplies. Appellees contended that Dunkin' Donuts prevented its franchisees from using their own premises, requiring them to lease or sublease the shop premises from Dunkin' Donuts on onerous terms. With respect to equipment, appellees contended that, prior to 1970, the franchise agreement required the franchisee to

purchase his "equipment package" from Dunkin' Donuts. In 1970, allegedly in response to the *Siegel v. Chicken Delight* litigation,[5] Dunkin' Donuts changed the standard form franchise agreement deleting the equipment purchase provision. But, the argument continued, Dunkin' Donuts' de facto policy of tying the equipment purchase to the trademark license did not change. Franchisees were given a "woefully inadequate" 30 day option to obtain equipment elsewhere, and those who inquired about it were pressured not to exercise it. Moreover, there was only one approved equipment vendor, and there was evidence that it would not sell directly to franchisees. The signs required for a Dunkin' Donuts store could be purchased from two sources: directly from Dunkin' Donuts, or from an approved sign vendor. Appellees argued that the apparent

5. *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722 (N. D. Cal. 1967), *modified sub nom., Chicken Delight, Inc. v. Harris*, 412 F. 2d 830 (9th Cir. 1969), *on modification*, 311 F. Supp. 847 (N. D. Cal. 1970), *aff'd in part, rev'd in part, and remanded*, 448 F. 2d 43 (9th Cir. 1971), *cert. denied*, 405 U. S. 955 (1972). *Siegel* was a franchisee class action very similar in substance to the case at bar, but *Siegel* did not present for decision the particular narrow issue presented by this interlocutory appeal. There, the Chicken Delight franchisees, unlike the Dunkin' Donuts franchisees here, relied on the express terms of the standard form Chicken Delight franchise agreement as imposing an allegedly illegal tie-in; the franchise agreement—common to all the franchisees—provided, in the district judge's view, the "integral core" of the complaint for purposes of determining whether common or individual questions predominated. 271 F. Supp. at 726. More significantly, the district court there did not premise its finding of predominant common issues on a rejection of the doctrine of individual coercion; nor did it certify a § 1292(b) interlocutory appeal on the propriety of that rejection. The district court here did both. This interlocutory appeal thus presents a narrow legal question: whether *this* class certification, expressly premised on rejection of the doctrine of individual coercion, was proper. Because *Siegel* did not present the narrow class certification issue presented by this interlocutory appeal, we have no occasion at this time to decide definitely whether *Siegel*, in its several aspects, ought to be favorably regarded in this circuit. Suffice it to say, the matter is not free from doubt. *See* n. 10, *infra*.

freedom of choice was wholly illustory because the only approved vendors were those who secretly paid to Dunkin' Donuts substantial sums for each sign purchase, raising prices to the franchisee accordingly and eliminating any economic savings that might otherwise have been available.

Dunkin' Donuts does not now sell or manufacture the supplies necessary to operate a doughnut shop. Instead, with the asserted purpose of assuring uniform quality of products sold,[6] it approves certain suppliers to sell to franchisees and, in the alternative, provides quality control specifications which non-approved vendors must satisfy. Appellees contended that this is not a quality control system at all, but a disguised tying arrangement: the quality control specifications are useless, designed only to insure that non-approved vendors do not qualify to sell to franchisees; approved suppliers make payments to Dunkin' Donuts as quid pro quo for being approved, and raise their prices accordingly. The effect of this system, appellees argued, is to tie to the trademark license the purchase of supplies from a limited group of sellers whose prices pass on to the franchisee the cost of the payments to Dunkin' Donuts. Appellees' arguments with respect to the tying aspect of the case stressed that the absence of express contractual tying provisions could have no importance if illegal tying policies could be satisfactorily established in other ways. And appellees emphasized that the focus of their case was not individual instances of illegal conduct, but a pervasive company policy, "firm and resolutely enforced", to tie the real estate, equipment, signs and supplies to the trademark license.

6. A trademark owner risks losing his rights by abandonment if he does not adequately supervise the quality of his licensees' products. *See* 15 U. S. C. § 1127.

Appellant both denied the existence of any illegal tie-ins, and insisted that, if there were any illegality, the absence of express contractual tying provisions robbed the case of significant common issues and required that the focus of proof be on the individual franchisee.

> Whether a franchisee was attracted by a "turn-key" offer, or compelled to accept a tie, could only be determined on an individual basis. Defendant emphasized the explicit statements in its promotional material and in its form contracts which reflected franchisees' freedom of choice. It emphasized also the variety of experiences admitted to by plaintiffs in their depositions and interrogatory answers. Some acknowledged dealing with defendant because they could not afford to acquire their own real estate or build their own shop, or buy equipment independently. They never considered dealing with anyone but defendant—the topic never came up. Some acknowledged they purchased equipment from other sources. Some acknowledged they had been *persuaded* by defendant's salesmen, *not coerced*, to deal with defendant. And a few plaintiffs testified that their franchise salesman had told them they must deal with defendant if they wanted the franchise.
>
> . . .
>
> Concerning the "approved supplier" claim, defendant argued that the issue was not whether in retrospect some less restrictive means of quality control could be devised, or whether defendant's specifications were good or bad, but rather whether defendant's specifications and procedures had been fairly applied. That issue was an individual one.

Appellant's Brief at 6-8 (footnotes omitted).

III.

Faced with the request for class action certification, the district court had to consider the tying claims within the narrow compass of Rule 23, F. R. Civ. P. The central issue on this appeal is the correctness of the district court's conclusion that the requirement of Rule 23(b)(3)—that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members"—was satisfied under the circumstances of this case. The district court based its conclusion that common questions predominated on its analysis of the substantive law of tying. Specifically it rejected the so-called doctrine of individual coercion which, broadly stated, requires that a plaintiff alleging an illegal tie-in establish that his acceptance of the tied item was coerced and not voluntary.

The district court's analysis of the law of tying consumed nearly two-thirds of its 155 page opinion—as the trial court put it: "[W]e have not presented a formulation with the precision of a jury charge." 68 F. R. D. at 116. Under the rubric of "synthesizing the use-coercion dialogue" the district court drew the following conclusions about the law of tying:

> 1. [T]he individual coercion doctrine is not properly a part of tying law. It is not necessary to prove coercion in order to establish an illegal tie; concomitantly, there can indeed be a "voluntary," yet illegal, tie. . . .
>
> 2. [T]he principal significance of the coercion notion in this area is as one mode of proving use of economic power. . . .
>
> 3. [P]roof of individual coercion is but one of several means of establishing the use of economic power

> or leverage. We agree with defendant that the individual coercion mode of proof of use is inapplicable in a class context. . . .
>
> 4. [In a class context] use of economic power may be established by evidence of a firm and resolutely enforced company policy to influence the franchisees to purchase from the franchisor or its designated sources. . . . [P]ersuasion or influence may be the virtual equivalent of coercion where there is an unequal relationship between the parties, as there is here. . . .
>
> [Or use of economic power in a class context may be inferred] from the acceptance by large numbers of buyers of a burdensome or uneconomic tie.

Ibid. at 114-15.

Having decided that the individual coercion doctrine was not properly a part of the law of tying but was really just one mode of proof and that the individual coercion mode of proof was inapplicable in a class context, the conclusion that a 23(b)(3) class action was proper—that common questions predominated over individual ones—followed directly. If franchisees were not required to prove that they were individually coerced to accept the tied product, the individual questions presented by that kind of proof would drop out of the liability determination. And the common questions raised by proof of company policy, or by proof that a large number of franchisees accepted a burdensome tie, would predominate. The district court concluded with respect to class certification:

> [W]e find that common questions of fact and law exist and predominate in the area of plaintiff's equipment, sign, real estate and supplier tying claims. This conclusion is premised mainly upon the emergence from the class action discovery of sufficient evidence of Dunkin' Donuts company policy in these areas to provide a *prima facie* substitute for the *Siegel II* express contractual tie. Needless to say, had we accepted rather than rejected the individual coercion doctrine, we could not have made this finding, for individual questions would clearly have predominated. In the absence of the individual coercion doctrine, we find that the principal issues for trial are issues which involve evidence common to the entire putative class. It is important to add that where a company policy emerges, matters of individual exception (and there may be such matters here) will not alter the result.

Ibid. at 141 (footnote omitted).

We disagree with the district court's novel approach to the law of tying. The "controlling question of law" certified to this court pursuant to 28 U. S. C. § 1292(b) has not been narrowly formulated; however, we understand it to involve, primarily, the district court's rejection of the necessity of proof of individual coercion and, secondarily, the district court's acceptance of the two alternative modes of proof mentioned above. We turn now to these issues.

IV.

A.

In view of the district court's thorough analysis of the law of tying, we are surprised by the statement that "the Supreme Court has not set forth a coercion requirement in the tying cases." 68 F. R. D. at 98. We believe that coercion is implicit—both logically and linguistically—in the concept of leverage upon which the illegality of tying is

premised: the seller with market power in one market uses that power as a "lever" to force acceptance of his product in another market. If the product in the second market would be accepted anyway, because of its own merit, then, of course, no leverage is involved; in the language of the district court, there is no use of the seller's market power. We find no ambiguity in the Supreme Court's language on this point. In *Times-Picayune Publishing Co. v. United States*, 345 U. S. 594, 605 (1953) the Court observed: "By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market. But any intrinsic superiority of the 'tied' product would convince freely choosing buyers to select it over others, anyway." The same opinion summarized the law of tying: "The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market." *Ibid.* at 614.

Northern Pacific Ry. v. United States, 356 U. S. 1, 5-6 (1958), perhaps the fountainhead of tying law under § 1 of the Sherman Act, provided the following exposition of the theory of the law of tying:

> For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed, "tying agreements serve hardly any purpose beyond the suppression of competition." *Standard Oil Co. of California v. United States*, 337 U. S. 293, 305-306. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products.

The same kind of language and analysis respecting leverage, force and coercion can be found in other leading Supreme Court tying cases. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U. S. 495, 503-04 (1969); *United States v. Loew's Inc.*, 371 U. S. 38, 49 (1962). In view of these teachings, we simply cannot accept the district court's view that the Supreme Court has not set forth a coercion requirement in tying cases.

B.

Saying that coercion is an element of a tying claim is, of course, not the same thing as saying that it must be established on an individual basis, but we think that the two statements are logically related. What is sufficient to coerce one buyer's choice may not be sufficient to coerce another buyer's choice; an item that one buyer might accept voluntarily, another might accept only if forced to do so. The expressions "coercion" and "individual coercion", in our view, reflect different perspectives on the same phenomenon. In the context of substantive tying law, "coercion" is the relevant term. But in the context of a class action, the question is whether "individual coercion" must be established by each plaintiff. We proffer this distinction with the modest hope of admitting into the semantic darkness of this realm of law some small

ray of light, and we will use the two expressions accordingly.

The district court explained the individual coercion doctrine as follows:

> Although the individual coercion doctrine has nowhere been explicated in detail, it appears to require proof by the plaintiff of such events and circumstances surrounding the relationship between the franchisor and *each* franchisee as will demonstrate that the franchisee was *coerced* into agreeing to an anticompetitive tie, usually of equipment or supplies.

68 F. R. D. at 78.

Notwithstanding its view that no coercion requirement had ever been authoritatively set forth, the district court perceived that a substantial number of district courts and courts of appeals had adopted the rule that individual coercion had to be proved.[7] *Ibid.* at 105. However, it was

7. *Smith v. Denny's Restaurants, Inc.*, 62 F. R. D. 459 (N. D. Cal. 1974); *Halverson v. Convenient Food Mart, Inc.*, No. 70-C-499 (N. D. Ill., Oct. 31, 1974); *Thompson v. T. F. I. Companies, Inc.*, 64 F. R. D. 140 (N. D. Ill. 1974); *E. B. E, Inc. v. Dunkin' Donuts of America, Inc.*, C. A. No. 36752 (E. D. Mich., July 24, 1974); *Capital Temporaries, Inc. v. The Olsten Corp.*, 365 F. Supp. 888 (D. Conn. 1973), *aff'd*, 506 F. 2d 658 (2d Cir. 1974); *Bogosian v. Gulf Oil Corp.*, 62 F. R. D. 124 (E. D. Pa. 1973); *In re 7-Eleven Franchise Antitrust Litigation*, 1972 Trade Cas. ¶ 74,156 (N. D. Cal. 1972); *Abercrombie v. Lum's, Inc.*, 345 F. Supp. 387 (S. D. Fla. 1972).

Two trial courts have not only adopted the rule but, indeed, have applied it to deny class certification to identical tying claims against Dunkin' Donuts. *Greene v. Dunkin' Donuts, Inc.*, Civil No. 3-5820-D (N. D. Tex., Aug. 29, 1973); *Zezulka v. Dunkin' Donuts, Inc.*, Wake County Gen. Ct. of Justice, N. C., Civil No. 73 CVS 2680 (Super. Ct. Div., April 25, 1974). The relevant portions of these cases are reproduced at 1714a-18a of the appendix.

A third court has granted summary judgment in favor of Dunkin' Donuts in a non-class action because the plaintiff was not "able to demonstrate some element of coercion to establish an illegal tying agreement." *E. B. E., Inc. v. Dunkin' Donuts, Inc.*, 387 F. Supp. 737, 738 (E. D. Mich. 1971).

of the opinion that *Federal Trade Commission v. Texaco Inc.*, 393 U. S. 223 (1968) and *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134 (1968) established that the rule was unsound. We disagree.

The district court concluded:

> In terms applicable here, *Texaco* holds that proof of use of economic power . . . does not require evidence of coercion, but rather that evidence of persuasion or influence will suffice where there is dominance in bargaining power of a franchisor over a franchisee, or, what is essentially the same, where there is evidence of an inherently coercive marketing system. We are satisfied that the same principle applies in the traditional tying situation which is involved here. The importance of this conclusion is that it is a further indication of the unsoundness of the individual coercion doctrine.

68 F. R. D. at 108-09.

Its discussion indicates that the district court was fully aware that the factual and legal complex there presented was very different from the complex involved here. *Texaco* was an enforcement proceeding brought by the Federal Trade Commission, not a trable damage action brought by private plaintiffs; it was brought under Section 5 of the Federal Trade Commission Act, 15 U. S. C. § 45, not under Section 1 of the Sherman Act, 15 U. S. C. § 1. *See, Belliston v. Texaco, Inc.*, 455 F. 2d 175 (10th Cir.) *cert. denied*, 408 U. S. 928 (1972) (finding no Sherman Act violation in a private action by Texaco dealers). It involved an agreement between two major corporations, Texaco and Goodrich, under which Texaco would induce its service station dealers to buy Goodrich tires, batteries and accessories, in return for a commission on the sales. The FTC found:

(1) that Texaco has dominant economic power over its dealers; (2) that Texaco exercises that power over its dealers in fulfilling its agreement to promote a sponsor Goodrich products; and (3) that anticompetitive effects result from the exercise of that power.

393 U. S. at 226. Based on these ultimate findings, the FTC concluded that the arrangement was an "unfair method of competition" unlawful under Section 5 of the FTC Act and ordered the companies to refrain from entering into such arrangements. The Supreme Court granted enforcement.

We cannot fail to note the very significant legal distinction between *Texaco* and the case at bar. Section 5 of the FTC Act is broader in its coverage than the antitrust statutes. It subsumes not only antitrust violations but other conduct as well:

> [T]he Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.

Federal Trade Commission v. Sperry & Hutchinson Co., 405 U. S. 233, 244 (1972); *see Times-Picayune Publishing Co. v. United States, supra,* at 609. Furthermore, an enforcement proceeding like *Texaco* necessarily implicates in some degree the principle of judicial deference to administrative expertise. In fact, in *Texaco* the Court stressed this limitation on its review function:

> While the ultimate responsibility for the construction of [Section 5 of the FTC Act] rests with the courts, we have held on many occasions that the determinations of the Commission, an expert body charged with the practical application of the statute, are entitled to great weight. *FTC v. Motion Picture Advertising Serv. Co.*, 344 U. S. 392, 396 (1953); *FTC v. Cement Institute,* 333 U. S. 683, 720 (1948). This is especially true here, where the Commission has had occasion in three related proceedings to study and assess the effects on competition of the sales-commission arrangement for marketing TBA. With this in mind, we turn to the facts of this case.

393 U. S. at 226. Finally, and most fundamentally, the legal focus was not on the relationship between Texaco and its service stations dealers, it was on the agreement between Texaco and Goodrich. The issue was whether Texaco and Goodrich were engaged in unfair competitive practices vis-à-vis Goodrich's competitors. That is a very different issue from the issue whether a franchisor is engaged in illegal tying vis-à-vis its franchisees.[7a] We simply

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7a. At this juncture, we believe it is important to emphasize that the plaintiffs here are not suppliers competing with Dunkin' Donuts for the franchisee market. The essence of the illegality of a tie-in is that it forecloses competition in the tied product market. It follows that the foreclosed competitors, the suppliers of the tied product, can sue for treble damages in the event of an illegal tie-in. *See* n. 10, *infra.* Section 4 of the Clayton Act provides treble damage relief to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U. S. C. § 15. *See NBO Industries Treadway Cos., Inc. v. Brunswick Corp.*, 523 F. 2d 262, 271-73 (3d Cir. 1975), *cert. granted sub nom., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 44 U. S. L. W. 3461 (Feb. 24, 1976). As we have indicated in our discussion of *Federal Trade Commission v. Texaco, Inc., supra,* we are conscious of the important distinction between an action, whether private or governmental, concerning the franchisee-franchisor relationship, and an action concerning the relationship between a franchisor and competing suppliers of the franchisee market. Here we are concerned with issues revolving around the former relationship and with an alleged injury to the "business or property" of the franchisee. This action does not concern the latter relation, nor does it require consideration of the very different kind of injury to "business or property" that would be involved in an action by suppliers. We express no opinion as to what kind of proof ought to be required of a plaintiff supplier alleging injury to his business from the tie-in.

cannot equate the factual and legal complex in *Texaco* with the case at bar in any material respect. Accordingly, we are unable to accept the district court's reliance on that case as authority for the unsoundness of the individual coercion doctrine.

Perma Life, the district court said, "emasculates the individual coercion doctrine." 68 F. R. D. at 110. Not only do we fail to discern in that case any attempt by the Court to impugn the virility of the doctrine, but we fail to perceive in that case any consideration of the doctrine. *Perma Life* was not a class action. *Perma Life* was an action by "Midas" muffler dealers seeking treble damages under the antitrust laws for losses suffered by virtue of restrictive provisions—*inter alia*, tying, exclusive dealing, resale price fixing—contained in their dealership contracts. The central issue was whether the doctrine of *pari delicto* applied to bar the dealers' action because they had participated in the illegal contracts. Holding that the action was not barred, the Court made the following observations about the franchisees' participation:

> Although petitioners may be subject to some criticism for having taken any part in respondents' allegedly illegal scheme and for eagerly seeking more franchises and more profits, their participation was *not voluntary* in any meaningful sense. They sought the franchises enthusiastically but they did not actively seek each and every clause of the agreement. Rather, many of the clauses were quite clearly detrimental to their interests, and they alleged that they had continually objected to them. Petitioners apparently accepted many of these restraints solely because their acquiescence was necessary to obtain an otherwise attractive business opportunity. . . . Moreover, even if petitioners actually favored and supported some of the other restrictions, they cannot be blamed for seeking to minimize the disadvantages of the agreement once they had been *forced* to accept its more onerous terms as a condition of doing business.

392 U. S. at 139-40 (emphasis added).

The Supreme Court granted certiorari in *Perma Life* because the lower court rulings "seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States." *Ibid.* at 136. If a franchisee were barred from suing by virtue of the fact that he had participated in the illegal franchising scheme, then, obviously, no action could ever be maintained by a franchisee against a franchisor. Dunkin' Donuts does not assert that any franchisee is barred from suit by virtue of participation in the franchising system. No threat here is posed to the effectiveness of the private action. The issue here is whether a class action can be maintained: the danger posed is not to antitrust plaintiffs, it is to antitrust defendants.[8] Accordingly, we find no support for the district court's view of *Perma Life*.

In sum, we disagree with the district court's view that the Supreme Court has not set forth a coercion requirement in tying cases; and with its reliance on *Texaco* and *Perma Life* as establishing the unsoundness of the doctrine of individual coercion. We believe that coercion has been

8. *Cf.* Handler, *The Inevitability of Risk Taking in Antitrust*, 9 Georgia L. Rev. 743 (1975). "Concomitantly with [the explosion in antitrust litigation] has come the increased use of the class action device in antitrust litigation. Few would deny today that Rule 23 is applicable to antitrust; the controversy ranges with regard to whether the class action plaintiff can satisfy all the Rule's preconditions. A class action of many thousands or indeed, millions of class members, based upon novel restraints found unlawful in government action after years of litigation can now confront a defendant with claims running into the hundreds of millions if not billions of dollars. This produces a risk factor of incalculable proportions." *Ibid.* at 753.

and continues to be an integral part of the law of tying as established by the Supreme Court.[9] With regard to the doctrine of individual coercion we believe it is open to us to reject it, as the district court did, or to accept it. Having in mind the particular factual complex before us, we choose the latter course. Our reasons follow.

V.

We are genuinely concerned that the law of tying is becoming a kind of semantic shell game, resting more on key words than on careful analysis. For that reason, we feel compelled to take a pragmatic and prudential, as well as a jurisprudential, view of the problem before us, taking into our perspective both the nature of the franchising industry and the effects which may be perceived to flow from the decision under review.

A.

The franchise system in this country today is not free from problems. Most, if not all, of these arise from the disparity in power and sophistication between franchisor

9. The view we take is not unexampled in the courts of appeals; it is consistent with an impressive line of cases in other circuits. *Capital Temporaries, Inc. v. Olsten*, 506 F. 2d 658, 663 (2d Cir. 1974) ("the plaintiff must establish that he was the unwilling purchaser of the tied item"); *Belliston v. Texaco, Inc.*, 455 F. 2d 175, 184 (10th Cir.), *cert. denied*, 408 U. S. 928 (1972) ("We conclude that, failing to find coercive conduct on the part of Texaco the commission sales plan is not a per se violation of the Sherman Act"); *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 446 F. 2d 1131, 1137 (2d Cir. 1971), *cert. denied*, 404 U. S. 1063 (1972) ("there can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice"); *Broussard v. Socony Mobil Oil Co.*, 350 F. 2d 346, 352 (5th Cir. 1965) (seller must be able "to coerce buyers of a different commodity in which [the seller] otherwise enjoys no competitive advantage"); *see Binks Mfg. Co. v. Ransburg Electro-Coating Corp.*, 281 F. 2d 252, 259 (7th Cir. 1960) (no indication that customers' "preference was due to defendant's insistence").

and franchisee. Abuses such as arbitrary franchise terminations and fraudulent promotional schemes have been the object of legislative concern. *See* Bohling, *Franchise Terminations Under the Sherman Act: Populism and Relational Power*, 53 Texas L. Rev. 1180, 1180-81 (1975) (citing legislative materials); Ozanne & Hunt, 92d Cong., 1st Sess., *The Economic Effects of Franchising* (Comm. Print 1971) (recommending, *inter alia*, legislation to protect franchisees from arbitrary terminations, and full disclosure legislation). *See generally, Mariniello v. Shell Oil Co.*, 511 F. 2d 853 (3d Cir. 1975). But, apart from abuses of the system, significant advantages—both economic and social—are perceived to flow from the franchise system of distribution. Franchising is said to: (1) provide opportunity for individuals, including persons of modest means, to go into business for themselves; (2) decrease the risk of failure of individual businesses; (3) decrease economic concentration by providing an alternative to vertical integration of business; and (4) benefit consumers by providing standardized products to an increasingly mobile public. Hunt, *The Socio-economic Consequences of the Franchise System of Distribution*, 36 Journal of Marketing 32, 33-35 (1972). Moreover, the sizeable, and apparently expanding, position that franchising occupies in our national economy cannot be gainsaid. Retail sales of franchising firms totaled more than $130 billion in 1972, almost 30% of all retail sales, according to estimates of the U. S. Department of Commerce. *Franchising in the Economy 1971-73.* The fast food franchises are among the most dynamic and successful in the industry. *Ibid.*

We do not imagine that many persons are, in any meaningful sense, forced to enter into franchise agreements. It may be that some do so because they have been deceived as to the terms, or the potential profitability, of

the franchise; it may be that others do so because they lack sophistication and do not understand or appreciate the details of the bargain. More realistically, we would expect to find that an arrangement apparently reasonable at its inception begins to seem burdensome to the franchisee as the business is successfully established. Only from the successful business can the franchisor effectively seek a continuing return on investment; yet as the venture prospers, the franchisee, in time, may come to regard the arrangement as onerous, restricting his profitability. Viewed this way, it is apparent that the underlying issues are economic as much as legal. What price may a franchisor properly demand for its "product"? [10] By what

10. Concerning the damages to the franchisees in *Siegel, supra,* n. 5, Professor Areeda asks the following troublesome questions:

> (1) How can the value of the franchise be rationally determined except by reference to what franchisees have demonstrated a willingness to pay? (2) Why must there be a recovery by the tie-in purchaser who was not in fact injured by the form in which the franchisor chose to take his reward? To be sure, that form may be challenged by society in order to maximize competition on the merits in the tied products, but query whether that is sufficient reason to award a windfall to an uninjured franchisee.
>
> Denying damages would mean, of course, that the franchisee would not sue the "wrongdoer". Should such a result be considered desirable? Whenever a legal rule condemns conduct regardless of significant effects, society may need a mechanism for disregarding the trivial. De minimis rules are one way, but they may complicate inquiries unnecessarily. Prosecutive discretion is another route: the Government will usually ignore the trivial. And, of course, the suppliers of the tied products can sue for an injunction, if not for damages, when a tie seems significant to them. The franchisee, on the other hand, may sue for the treble damage windfall allowed by the district court regardless of the significance of the restraint and notwithstanding the fact that he paid no more than he would have paid in the form of a franchise fee.

P. Areeda, Antitrust Analysis, Problems, Text, Cases ¶ 554, at 617 (2d ed. 1974).

Concerning the effects of the holding in *Siegel,* a law review commentator makes the following observations:

means may it properly exact that price? Of course, within the narrow compass of this appeal we have no occasion to address such fundamental issues, or even to consider whether such issues are properly within the ambit of judicial cognizance. We have rehearsed these issues, not because they control our decision, but because we ought not to be oblivious to the mainsprings of this litigation.

B.

To prove a per se illegal tie-in, a plaintiff must establish three things. First, he must establish that the conduct in question was a tie-in: "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." *Northern Pacific Ry. v. United States, supra,* 356 U. S. at 5. Second, he must establish that the seller "has sufficient [11] economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product." *Ibid.* at 6. And third, he must establish that "a 'not insubstantial' amount of interstate commerce is affected." *Ibid.*

10. (Cont'd.)

> By being overly zealous in striking down tie-ins under section 1 of the Sherman Act, courts may inadvertently cause vertical integration and thus destroy the advantage of "enabling numerous groups of individuals with small capital to become entrepreneurs." Therefore, courts should balance the coercive effect of tie-ins on the franchisee with the benefit he derives from the franchisee form of doing business. In no case should they lose sight of the economic realities of franchising including the necessity that the franchisor receive adequate compensation for the license of his trademark.

Comment, *Franchise Tie-Ins and Antitrust: A Critical Analysis,* 1973 Wis. L. Rev. 847, 875 (footnotes omitted).

11. We hasten to note that even a contract will not relieve the plaintiff from the burden of showing the fact of damage and thus may not establish a predominance of common questions. *See Pitchford v. Pepsi, Inc.,* — F. 2d — (3d Cir., Nos. 75-1136/7, Dec. 24, 1975).

Obviously, with respect to the first element, a formal agreement is not necessary, although it is sufficient. But, in the absence of a formal agreement, a plaintiff must establish in some other way that a tie-in was involved and not merely the sale of two products by a single seller. This can be done by proof that purchase of one product, the tied product, was not voluntary, *i.e.*, by proof of coercion. The effect of the district court's formulation is to remove the necessity for proving a tie-in. Under the district court's formulation it is only necessary to prove salesmanship in connection with the sale of two products by a seller-franchisor with dominant economic power over a buyer-franchisee, and a tie-in is established. The practical effect of this is to substitute proof of economic power for proof of tie-in. Proof of economic power must, perforce, focus on the seller; but proof of a tie-in must focus on the buyer, because a voluntary purchase of two products is simply not a tie-in.

When we consider the district court's formulation in the context of a franchise class action, we are further persuaded that it lacks prudential as well as jurisprudential support. The district court stated "that the individual coercion mode of proof of use [of economic power] is inapplicable [unnecessary?] in a class context." 68 F. R. D. at 115. Under the district court's theory a class of franchisees could prove a per se illegal tying arrangement by establishing: (1) that the franchisor was economically dominant over its franchisees; (2) that the franchisor offered for sale, and sold, more than one product to its franchisees; and (3) that the franchisor had a policy to persuade franchisees to buy its products.

It is difficult to conceive of a franchisor-franchisee relationship in which this could not be established. The very nature of the franchise institution contemplates the presence of a comparatively strong financial entity—the franchisor—that makes available to a relatively weaker financial entity—the franchisee—an attractive business opportunity at a relatively modest initial investment. One of the primary attractions of the franchise system to franchisees is that the franchisor offers a package deal including many, if not all, of the items necessary to operate the business.[12] And we cannot imagine any seller that would not have a firm and resolutely enforced policy to persuade buyers to buy what is offered for sale. Thus, inherent in *any* franchise arrangement are the factors the district court considered sufficient to establish prima facie liability, in class action form, for a tie-in. This is not a *reductio ad absurdum* extension of the district court's formulation; it is a stark, routine application of it.

As an alternative to proving a policy to persuade, the district court would allow illegal use of economic power to be inferred from proof of "acceptance by large numbers of buyers of a burdensome or uneconomic tie." 68 F. R. D. at 115. This test, in our view, has the same pragmatic drawback as the policy to persuade test. Assuming that what is "economic" from a franchisor's point of view is "uneconomic" from a franchisee's, this test would render prima

12. In granting summary judgment for Dunkin' Donuts in *E. B. E., Inc. v. Dunkin' Donuts, Inc. supra*, n. 7, the district court emphasized the attractiveness of the package deal to the franchisee.

> From the record established to date in this matter, one theme is consistently evident: Plaintiff sought and desired a packaged, ready-to-go business operation. The plaintiff's officers, Mr. and Mrs. Edwards, were perfectly willing to rely on defendants' services in assembling the business package, and it never occurred to them to do otherwise. It was defendants' ability to deliver such a package that was attractive to the plaintiff. Far from claiming that she and her husband were forced to accept the equipment, the property lease and the signs as a condition for obtaining the franchise, Mrs. Edwards asserts merely that it was never affirmatively impressed upon them that they could buy from other sources.

387 F. Supp. at 737-38.

facie illegal virtually every franchise system involving "large numbers" of franchisees.

But there is another, equally serious, problem with the district court's alternative theory. Whether we call it "*petitio principii*" or "arguing in a circle" or "begging the question", the brute fact is that this test is based on circular reasoning.[13] Obviously, if the question is whether there is a "tie", proof that large numbers of buyers acepted a burdensome or uneconomic "tie" is not helpful. The "proof" assumes the answer rather than proving it. We understand the argument that proof of acceptance of a burdensome or uneconomic offer of a secondary ("tied") product is some evidence of coercion. We cannot, however, accept the proposition that such proof, alone, would suffice to establish, prima facie, the coercion element of an illegal tie-in claim.[14] Establishing that buyers purchase products A and B from the seller does not establish that the seller ties the sale of product A to the burchase of product B. It merely establishes that buyers purchase products A and B from the seller. *Cf. Northern Pacific Ry. v. United States, supra,* 356 U. S. at 17 (Harlan, J., dissenting). It might be that proof of a policy to persuade, or proof of purchase by large numbers of buyers, would be relevant to other issues, under other circumstances. But we cannot agree with the district court that these modes of proof—taken singly or in combination—are proper substitutes here for proof of individual coercion by each franchisee. Moreover, the district court's proffered alternatives would have the practical effect of shifting the burden of proof in the case, relieving the plaintiff of his burden to prove illegality and imposing on the defendant the burden of disproving illegality.

13. Learned Hand reminds us "not to be misled into assuming the conclusion in the minor premise—not to beg the question. I can think of no single fault that has done more to confuse the law and to disseminate litigation. One would suppose that so transparent a logical vice would be easily detected; but the offenders pass in troops before our eyes, bearing great names and distinguished titles. The truth is that we are all sinners; nobody's record is clean; and indeed it is only fair to say that much of the very texture of the law invites us to sin, for it so often holds out to us, as though they were objective standards, terms like 'reasonable care,' 'due notice,' 'reasonable restraint', which are no more than signals that the dispute is to be decided with moderation and without disregard of any of the interests at stake. So inveterate is the disposition to eschew all deduction in such cases, that some ironist might argue that, given the average judicial capacity for self-scrutiny, it is safer not to expose the springs of decision, because the chances of a right result are greater than that its support will endure disclosure. Perhaps so; maybe, for the ingenuous and the artless to beg the question is nature's self-protective artifice." Hand, *Thomas Walter Swan,* 57 YALE L. J. 167, 170 (1947).

14. We do not meet the question whether evidence of acceptance by a large number of buyers of the same type of offer would be relevant in a proceeding on an individual claim. We are persuaded, however, that even if such evidence were deemed admissible, such proof alone would not suffice to establish a coercion prima facie.

VI.

The basic assumption inherent in the district court's formulation is "that persuasion or influence may be the virtual equivalent of coercion where there is an unequal relationship between the parties, as there is here." 68 F. R. D. at 115. And the district court's basic fear seems to be that an "almost metaphysical analysis [would] be required if we were to adopt [a coercion standard]; courts would be obliged to parse the human personality in the most sophisticated terms in an effort to determine the franchisee's state of mind vis-àvis the putative (and ill-defined) coercion standard." *Ibid.* at 112. We are the first to admit that there can be no bright line distinguishing influence, persuasion, and aggressive salesmanship on the one hand, from coercion, on the other. But it is difficult to conceptualize a more damning denunciation of the private free enterprise system than the thesis that there is

no distinction where there is an unequal relationship beween buyer and seller. The purpose of the antitrust laws is to stimulate economic competition, the essence of which is the presence of many competing sellers; salesmanship—the art of persuasion and influence—is inherent in competition among sellers. It is only when the buyer's freedom to choose a given product is restricted that the tying doctrine comes into play: so long as "the buyer is free to take either product by itself there is no tying problem." *Northern Pacific Ry. v. United States, supra,* at 6 n. 4.

Moreover, we are aware of no principle that courts will not inquire into state of mind where that is relevant; the fact that given legal line is hard to draw does not excuse judges, and juries, as each case arises, from doing their best to draw it. Consider, for example, the problem of determining degrees of culpability: was the conduct "intentional", "knowing", "reckless", "willful"? These kinds of questions are metaphysical, perhaps, but it is the unfortunate province of the courts to struggle with them. *See, e.g., Shaffer v. Schlesinger,* — F. 2d — (Nos. 75-1569 and 75-2257, 3d Cir. — 1976) (involving the question whether an individual's conscientious objector beliefs were sincerely held).

While we have found indications of legislative concern over abuses in franchising, we have found no Congressional expression of policy suggesting that franchising, per se, violates the letter or the spirit of the antitrust laws. On the contrary, we are conscious of a general Congressional approbation of the franchising system, particularly in light of the opportunity it provides for small businesses.[15] Nor

15. *E.g.,* "The committee has heard ample evidence to support the conclusion that franchising, properly regulated, can significantly increase small business opportunities throughout urban and rural America." Senate Select Committee on Small Business, *Impact of Franchising on Small Business,* S. Rep. No. 91-1344, 91st Cong., 2d Sess. 1 (1970).

has the attention of this court been drawn to any individual or social interest that is offended by the franchise system such that it might justify the massive judicial pronouncement that we perceive would be implicated by an approval of the district court's decision; a pronouncement of molar, rather than molecular, consequences that in our view would threaten the viability of the franchise system in our economy.[16]

We answer the controlling question of law as follows: The district court erred in rejecting the individual coercion doctrine under the circumstances of this case. Where, as here, plaintiff franchisees place no reliance on express contractual tie-ins, each, individually, must prove that his purchases were coerced as an element of establishing a prima facie case of illegal tying.[17] The district court's class certification with respect to the tying claims was expressly premised on its erroneous rejection of the individual coercion doctrine. See page A191, *supra.* Accordingly, the certification should not have been granted.

The order certifying a class with respect to the antitrust tying claims will be reversed, and the cause remanded for further proceedings consistent with this opinion.

16. Holmes, J., in *Southern Pacific Co. v. Jensen,* 244 U. S. 205, 221 (1917): "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."

17. We do not decide the question whether the individual coercion doctrine would bar a class certification where a potential class of plaintiffs relies on express contractual provisions.

APPENDIX E.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 75-1625/6

DAVID UNGAR, ET AL.

v.

DUNKIN' DONUTS OF AMERICA, INC., ET AL.,
Appellants in No. 75-1625

JOHN RADER, ETC., ET AL.

v.

DUNKIN' DONUTS, INC., ETC., ET AL.,
Appellants in No. 75-1626

Sur Petition for Rehearing.

Present: SEITZ, *Chief Judge,* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,
/s/ ALDISERT
Judge

Dated: April 5, 1976

APPENDIX F.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 75-1625/75-1626

DAVID UNGAR, ET AL.

v.

DUNKIN' DONUTS OF AMERICA, ETC.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formula mandate in the above cause be, and it is hereby stayed until May 12, 1976.

/s/ ALDISERT
Circuit Judge

Dated: April 14, 1976

IN THE

Supreme Court of the United States

No. 75-1636

DAVID UNGAR, *et al.*
and
JOHN RADER, *et al.*,
Petitioners,
v.
DUNKIN' DONUTS OF AMERICA, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (App. A, A.1-A. 151) is reported at 68 F.R.D. 65; 1975-1 Trade Cas. ¶ 60,204 (E.D. Pa. 1975). The opinion of the Court of Appeals for the Third Circuit (App. D, A.176-A. 209) is reported at 1976-1 Trade Cas. ¶ 60,763 (3d Cir. 1976).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The court of appeals ruled that a sale on condition, the threshold element of an unlawful antitrust tying arrangement, requires a showing that buyers' purchases of the allegedly tied item were coerced and not voluntary. The court further ruled that two alternate modes of proof of conditioning, on which the district court expressly premised class action certification, were not adequate: (1) a showing that the seller had a "policy to persuade" buyers to purchase the allegedly tied item; or (2) a showing that many buyers in fact purchased the item.

The question presented is whether the court of appeals correctly applied principles of antitrust law regarding the proof needed to establish a sale on condition and, therefore, correctly reversed the class action certification.

STATUTE AND RULE INVOLVED

The pertinent provisions of section 1 of the Sherman Act, 15 U.S.C. § 1, and Rule 23 of the Federal Rules of Civil Procedure are set forth in the Petition (Pet.) at pp. 3-4.

STATEMENT

Petitioners seek review of a judgment of the Court of Appeals for the Third Circuit which, on an interlocutory appeal, unanimously reversed a class action certification of several antitrust tying claims. The district court's certification was expressly premised on its interpretation of the requirements for proof of an unlawful tying arrangement. The court of appeals rejected that interpretation and, accordingly, reversed.

These suits were brought by 14 present and former franchisees of Dunkin' Donuts against the franchisor. Petitioners individually assert damages in excess of three million dollars on a variety of alleged antitrust and other claims. Petitioners also seek to represent a class of all present and former Dunkin' Donuts franchisees.

Respondents operate a coffee and doughnut franchising system under the Dunkin' Donuts trademark. Respondents offer to lease franchisees the land and building for a shop, as well as to sell them the equipment needed to operate the shop. Respondents do not sell the supplies or ingredients for the products sold by franchisees under the Dunkin' Donuts trademark. To assure uniform quality, however, respondents maintain a quality control system and require that suppliers meet certain standards.

Petitioners alleged that respondents had unlawfully tied the use of their trademark to the purchase by franchisees of equipment, signs and supplies and the lease of real estate. The class action certification before the court of appeals concerned these tying claims.[1] Class actions with respect to another antitrust claim and a contractual claim were certified by the district court, but these certifications were not dealt with by the court of appeals (A. 185).

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[1] The district court made no findings with respect to the "existence or non-existence of the alleged tying violations." (A. 133). Thus, references in the petition to "violations . . . evidenced by the district court's findings" (Pet. 31) are inaccurate.

The pivotal issue in this case concerns the kind of evidence which is required to prove the existence of a tie, *i.e.*, that use of the Dunkin' Donuts trademark was conditioned upon franchisees' acceptance of the real estate, equipment, signs and supplies which were offered.[2] The court of appeals approved "the so-called doctrine of individual coercion which, broadly stated, requires that a plaintiff alleging an illegal tie-in establish that his acceptance of the tied item was coerced and not voluntary" (A. 189). The district court, however, had ruled that such proof was unnecessary. Instead, that court believed it would be sufficient to prove "either that the franchisor had a policy to persuade the franchisees to accept the allegedly tied items, or that a large number of franchisees had, in fact, accepted them" (A. 180).

The district court acknowledged that it could not have properly certified a class without rejecting the individual coercion doctrine, since otherwise "individual questions would clearly have predominated" over common questions (A. 131). Because neither of the alternate showings the district court embraced required individualized proof, it concluded that common issues predominated.

The district court asserted that this Court "has not set forth a coercion requirement in the tying cases" (A. 46), although it acknowledged that other lower federal courts had required proof of coercion. The

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[2] Petitioners, as the court of appeals noted, "do not rely on the terms of their franchise agreements" with respect to any of the tying claims at issue (A. 184). The petition thus raises no issue regarding certification of class actions when common written agreements contain alleged tie-ins. *Cf. Chicken Delight, Inc.* v. *Harris,* 412 F.2d 830 (9th Cir. 1969).

court supported its reading of this Court's opinions by a "synthesis" of the "use-coercion dialogue" it perceived in those opinions and concluded, ultimately, that it "is not necessary to prove coercion in order to establish an illegal tie; concomitantly, there can indeed be a 'voluntary,' yet illegal, tie" (A. 79).

The court of appeals disagreed with the district court's "novel approach to the law of tying" (A. 191). The court expressed "surprise" at the statement that this Court had not required a showing of coercion to prove an illegal tie-in (*id.*). To the contrary, the court of appeals concluded after its own review of the principal decisions of this Court, "coercion has been and continues to be an integral part of the law of tying as established by the Supreme Court" (A. 200). Furthermore, the court noted, its view "is consistent with an impressive line of cases in other circuits" which have required proof of coercion (*id.* n. 9).

Having concluded that a showing of coercion is necessary to prove an illegal tie-in, the court of appeals examined "the particular factual complex" at issue (A. 200) to determine whether either of the alternate modes of proof adopted by the district court is an adequate substitute for a showing of individual coercion of franchisees. The court concluded, from "a pragmatic and prudential, as well as jurisprudential, view" (*id.*), that neither mode of proof would suffice.

The court reasoned that "a plaintiff must establish in some . . . way that a tie-in was involved and not merely the sale of two products by a single seller" (A. 204). The district court's approval of a showing of a "policy to persuade" would, as a practical matter,

mean that proof of mere "salesmanship in connection with the sale of two products by a seller-franchisor" would be sufficient (*id.*). Thus, a tie-in could be found even if the buyer had simply made two voluntary purchases from the same seller. Similarly, the court concluded, the other mode of proof adopted by the district court—purchases by a large number of buyers of two products from a single source—begs the question whether the purchases were the result of an illegal tie-in or simply lawful salesmanship (A. 205-06).[3]

The court of appeals found an additional pragmatic reason "in the context of a franchise class action" (A. 204) for rejecting the alternate modes of proof which the district court approved. Any seller will have "a firm and resolutely enforced policy to persuade buyers to buy what is offered for sale" (A. 205). Similarly, a large number of franchisees may be expected to accept the items offered by the franshisor.[4] "Thus, inherent in *any* franchise arrangement are the factors the district court considered sufficient to establish prima facie liability, in class action form, for a tie-in" (A. 205) (emphasis in original).

[3] Petitioners characterize the purchases in question as being on uneconomic and burdensome terms, and repeatedly assert that franchisees could obtain equipment from suppliers other than Dunkin' Donuts for substantially less (Pet. 13 n. 10, 18, 22). The district court made no finding on this issue, nor could it appropriately have done so, particularly since there was no evidence to support the assertion. Thus, the district court was careful to refer to petitioners' claim as an allegation (A. 12) and a "contention" (A. 102).

[4] As the court observed, "[o]ne of the primary attractions of the franchise system to franchisees is that the franchisor offers a package deal including many, if not all, of the items necessary to operate the business" and permits the franchisee to begin his business "at a relatively modest investment" (A. 205).

The "stark, routine application" (*id.*) of the district court's ruling, in other words, would produce a certified class action in every franchising case involving the issue whether the sales were "conditioned," and would permit imposition of antitrust liability without proof that the allegedly tied purchases were involuntary. The court of appeals refused to endorse such a radical departure from settled principles of antitrust law in order to facilitate certification of class actions (A. 209). It therefore concluded that the district court should not have rejected the individual coercion doctrine in favor of the alternate modes of proof and that the class action certification, expressly premised on that determination, "cannot stand" (A. 191).

ARGUMENT

The court of appeals' decision was completely consistent with principles regarding proof of conditioning which have been long settled by this Court and regularly applied by the lower federal courts. Petitioners assert that the court of appeals has added "a separate and distinct element termed 'individual coercion'" (Pet. 3) to the requirements, established by this Court, which plaintiffs must prove to establish a *per se* illegal tying arrangement. Petitioners have misread the court of appeals' decision. The court did not add a new element to the definition of a tying offense. It simply applied the standard requirement for proof of the conditioning element of a tie-in, *i.e.,* that there was "an agreement by a party to sell one product but only on condition that the buyer also purchase a different (or tied) product." *Northern Pacific Ry. Co.*

v. *United States,* 356 U.S. 1, 5 (1958).[5] Petitioners' suggestion that this established requirement should be relaxed in order to facilitate a favorable class action ruling was properly rejected.

I. The Decision of the Court of Appeals Correctly Applied This Court's Decisions in Tying Cases and Does Not Conflict with Decisions of Other Lower Federal Courts

The decisions of this Court, as the court of appeals recognized, have consistently held that a sale "on condition" is established by a showing that a buyer is required, coerced, or forced to purchase the tied product, but not by a mere showing that two products were offered and purchased. In *Times-Picayune Pub. Co.* v. *United States,* 345 U.S. 594, 605, 614 (1953), the Court observed (emphasis supplied):

> By conditioning his sale of one commodity on the purchase of another, a seller *coerces* the abdication of buyers' independent judgment as to the "tied" product's merits and insulates it from the competitive stresses of the open market. . . . The common core of the adjudicated unlawful tying arrangements is the *forced* purchase of a second distinct commodity with the desired purchase of a dominant "tying product."

Similarly, this Court spoke in *Northern Pacific* of tying agreements which were "exacted" or "impose[d]" (356 U.S. at 5, 6) and, in at least two other cases, of agreements which were "forced." *Fortner Enterprises, Inc.* v. *United States Steel Corp.,* 394 U.S. 495, 503-04 (1969); *United States* v. *Loew's, Inc.,* 371

[5] The other elements of a *per se* illegal tie-in—degree of economic power and impact on interstate commerce (356 U.S. at 6-7)—were not at issue on the interlocutory appeal.

U.S. 38, 39 (1962). Moreover, this Court made it plain in *Northern Pacific* that "where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price." 356 U.S. at 6 n.4.

There is, moreover, no conflict between the decision of the court of appeals and decisions of other courts of appeals, which have consistently recognized that a showing of coercion, rather than a voluntary purchase, is necessary to prove conditioning. For example, the Second Circuit held that "there can be no illegal tie unless unlawful coercion by the seller influences the buyers' choice." *American Mfg. Mut. Ins. Co.* v. *American Broadcasting–Paramount Theatres, Inc.,* 446 F.2d 1131, 1137 (2d Cir. 1971), *cert. denied,* 404 U.S. 1063 (1972). *See also Umphres* v. *Shell Oil Co.,* 512 F.2d 420, 422-23 (5th Cir. 1975); *Capital Temporaries, Inc.* v. *The Olsten Corp.,* 506 F.2d 658, 662 (2d Cir. 1974)[6]; *Broussard* v. *Socony Mobil Oil Co.,* 350 F.2d 346, 352 (5th Cir. 1965); *McCullough Tool Co.* v. *Well Surveys, Inc.,* 343 F.2d 381, 408 (10th Cir. 1965); *Osborn* v. *Sinclair Refining Co.,* 286 F.2d 832, 836 (4th Cir. 1960), *cert. denied,* 366 U.S. 963 (1961); *Binks Mfg. Co.* v. *Ransburg Electro-Coating Corp.,* 281 F.2d 252, 259 (7th Cir. 1960); *American Securit Co.* v. *Shatterproof Glass Corp.,* 268 F.2d 769, 777 (3d

[6] The Second Circuit has noted that "[a]n unremitting policy of tie-in . . . constitutes the requisite coercion under *Capitol Temporaries.*" *Hill* v. *A-T-O, Inc.,* 1976-1 Trade Cas. ¶ 60,873 at 68,825 (2d Cir. 1976). In *Hill,* the principal issue in the instant litigation was conceded: there was an "admitted tie" since it was "undisputed" that defendant would never permit the consumer to obtain the tying product without purchasing the tied item. *Id.* at 68,824, 68,825.

Cir.), *cert. denied,* 361 U.S. 902 (1959).[7] Petitioners' suggestion that decisions in the lower courts have produced "confusing and conflicting" results (Pet. 29) is thus without basis.[8]

One district court has, in fact, granted summary judgment in favor of Dunkin' Donuts precisely because the plaintiff-franchisee was "not able to demonstrate some element of coercion to establish an illegal tying agreement" with respect to the same allegedly tied items as are involved in this case. *E.B.E., Inc.* v. *Dunkin' Donuts, Inc.,* 387 F. Supp. 737, 738 (E.D. Mich. 1971). And two trial courts, as the court of appeals noted (A. 194 n. 7), have applied the individual coercion rule "to deny class certification to identical tying claims against Dunkin' Donuts." *Greene* v. *Dunkin' Donuts, Inc.,* C.A. No. 3-5820-D (N.D. Tex., Aug. 29, 1973); *Zezulka* v. *Dunkin' Donuts, Inc.,* Wake

[7] Numerous district courts have refused to certify class actions with respect to claims similar to those presented here because individual issues, including the issue whether the sale was conditioned or coerced, predominated over common issues. *See, e.g., Plekowski* v. *Ralston Purina Co.,* 1975-2 Trade Cas. ¶ 60,411 (M.D. Ga. 1975); *Smith* v. *Denny's Restaurants, Inc.,* 62 F.R.D. 459 (N.D. Cal. 1974); *Halverson* v. *Convenient Food Mart, Inc.,* 1975-1 Trade Cas. ¶ 60,254 (N.D. Ill. 1974); *Thompson* v. *T.F.I. Companies, Inc.,* 1974-2 Trade Cas. ¶ 75,215 (N.D. Ill. 1974); *Bogosian* v. *Gulf Oil Corp.,* 62 F.R.D. 124 (E.D. Pa. 1973); *Seligson* v. *The Plum Tree, Inc.,* 61 F.R.D. 343 (E.D. Pa. 1973); *Abercrombie* v. *Lum's, Inc.,* 345 F. Supp. 387 (S.D. Fla. 1972); *In re 7-Eleven Franchise Antitrust Litigation,* 1972 Trade Cas. ¶ 74,156 (N.D. Cal. 1972).

[8] Of the seven cases petitioners cite for this contention, the alleged tie-in was contained in a written agreement in four. *Chicken Delight, Inc.* v. *Harris,* 412 F.2d 830 (9th Cir. 1969); *Aamco Automatic Transmissions* v. *Tayloe,* 1975-2 Trade Cas. ¶ 60,666 (E.D. Pa. 1976); *Hawkins* v. *Holiday Inns, Inc.,* 1975 Trade Cas. ¶ 60,153 (W.D. Tenn. 1975); *Falls Church Bratwursthaus* v. *Bratwursthaus Mgmt. Corp.,* 354 F. Supp. 1237 (E.D. Va. 1973). As noted above, petitioners do not rely on a written agreement here. Two other cases arose in the Third Circuit, where any confusion or conflict generated by the opinion of the district court below has been eliminated by the decision of the court of appeals. *Sommers* v. *Abraham Lincoln Federal Savings and Loan Assn.,* 1975-1 Trade Cas. ¶ 60,280 (E.D. Pa. 1975); *Herrmann* v. *Atlantic Richfield Co.,* 65 F.R.D. 585 (W.D. Pa. 1974). The remaining decision recognized that a showing of coercion was necessary to prove an illegal tie-in, but concluded, in a one-page order, that the plaintiffs' allegation of an "overall pattern of coercive behavior" created a sufficiently common issue to warrant a conditional class certification pending completion of discovery on the class action issue. *In re Clark Oil and Refining Corp.,* 1974-1 Trade Cas. ¶ 74,880 at 95,971-72. (E.D. Wis. 1974).

Cy. Gen. Ct. of Justice, N. Car., No. 73CVS 2680 (Sup. Ct. Div., April 25, 1974).[9]

II. The Decision of the Court of Appeals Was Faithful to Principles of Antitrust Law

The court of appeals' ruling properly adhered to principles of antitrust law which underlie the decisions of this Court and the lower federal courts. The court of appeals recognized that permitting proof of a "policy to persuade" or of purchases by large numbers of buyers to substitute for a showing of coercion would interfere with legitimate efforts by sellers to sell their products, and thereby inhibit competition. The court observed, correctly, that "[t]he basic assumption inherent in the district court's formulation [A. 81] is 'that persuasion or influence may be the virtual equivalent of coercion where there is an unequal relationship between the parties, as there is here' " (A. 207). The court of appeals rejected that assumption, pointing out that (A. 207-08)

[9] Both orders are unpublished. They were reproduced at pages 1717a-18a of the appendix in the court of appeals.

> . . . [i]t is difficult to conceptualize a more damning denunciation of the private free enterprise system than the thesis that there is no distinction [between coercion and persuasion] where there is an unequal relationship between buyer and seller.

Outlawing persuasion would undermine the antitrust laws because their "purpose . . . is to stimulate economic competition, the essence of which is the presence of many competing sellers; salesmanship—the art of persuasion and influence—is inherent in competition among sellers." *See United States* v. *Loew's, Inc.*, 371 U.S. 38, 55 (1962); *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 6 n. 4 (1958); *United States* v. *Paramount Pictures*, 334 U.S. 131, 159 (1948).[10]

The court of appeals added that a departure from antitrust principles to correct alleged evils of the franchising system was not warranted. It pointed out that there was certainly "no Congressional expression of policy suggesting that franchising, per se, violates the letter or spirit of the antitrust laws. On the contrary, we are conscious of a general Congressional approbation of the franchising system, particularly in light of the opportunity it provides for small businesses" (A. 208). The court was quite properly unwilling to make a "massive judicial pronounce-

[10] The court's insistence that the antitrust laws require recognition of the distinction between persuasion and coercion also reflects the intent of Congress, as indicated in the Automobile Dealer Franchise Act of 1956, 15 U.S.C. §§ 1221-1225. Congress imposed a duty on automobile manufacturers and dealers to act in "good faith" in connection with their franchise agreements. The "good faith" standard required each party to refrain from "coercion" and "intimidation." 15 U.S.C. § 1221(e). However, the statute specifically provided that "recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith."

ment"—consistent with neither the decisions of this Court nor Congressional policy—which would "threaten the vitality of the franchise system in our economy" (A. 209). The court thus had the soundest of reasons for reversing the district court.

III. Principles of Antitrust Law Should Not Be Distorted in Order To Facilitate Class Actions

Finally, no reason for review is presented by petitioners' contention that the "decision of the Court of Appeals will act as an effective deterrent to private enforcement of the antitrust laws" by eliminating the possibility of "franchise tie-in class actions where the complained of practices are not written in the franchise documents" (Pet. 23). Petitioners greatly exaggerate both the effect of the court of appeals' decision and the proper role of class actions in enforcing the antitrust laws.

There is little doubt that, under petitioners' theory, the role of class actions in tying cases would be greatly expanded to the point where certifications would be "routine" (A. 205). On the other hand, it is evident that, under the court of appeals' ruling and the impressive array of lower court decisions which have rejected class actions in circumstances similar to those present here, a certification is unlikely to be granted when the element of conditioning is disputed. The court of appeals' decision does not, however, foreclose all class actions against franchisors in tying cases. The decision was limited to the "circumstances of this case" (A. 209). It does not purport to prevent prospective class action plaintiffs from demonstrating, in any case, that common issues *predominate* over individual issues. For example, the principal dispute may involve ele-

ments of a tying arrangement, other than conditioning, with respect to which the issues may be common. Class action determinations properly are made on a case-by-case basis, and there is nothing in the court of appeals' decision to suggest that it has announced an incorrect standard for reaching those determinations.

In any event, private enforcement of the antitrust laws does not rest exclusively on the availability of class actions. Congress has provided other incentives to private attorneys general, specifically treble damage recovery and the award of attorneys' fees. *See* 15 U.S.C. § 15. This combination of incentives, unique to antitrust enforcement, renders unlikely the prospect of diminished private antitrust enforcement. In this case, for example, the named plaintiffs have individually asserted treble damages exceeding three million dollars. That should provide adequate incentive to the plaintiffs, other plaintiffs who may seek to join with them and assert additional claims, and their counsel to act vigorously as private attorneys general.[11]

The most significant response to petitioners, however, is that acceptance of their position regarding class actions would require a change in substantive antitrust law with dramatic implications. If the conditioning element of a tying violation could be proven by a showing that the seller had a "policy to persuade" (or that large numbers of purchasers bought the allegedly "tied" item), then, as the court of appeals observed, a class action certification would automatically follow. But settled antitrust principles plainly require more than a showing of a "policy to persuade"

[11] Counsel for petitioners has stated that, if respondents "want to have individual trials for each franchisee, well, we'll give them individual trials." *Nation's Restaurant News,* Apr. 12, 1976, at 38.

or large numbers of purchases to prove that sales were made on condition. Therefore, the certification was properly reversed.

There can be no doubt, as the Rules Enabling Act indicates, that Rule 23 was not intended and should not be employed to effect changes in substantative law. *See* 28 U.S.C. § 2072(a). Yet that is the precise result which petitioners urge on this Court. Such a contention does not warrant plenary consideration.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1636

DAVID UNGAR, et al. and JAMES RADICE, et al.,
Petitioners,

v.

DUNKIN' DONUTS OF AMERICA, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS IN OPPOSITION

Respondents respectfully invite the Court's attention to the recent decision of the Court of Appeals for the Fifth Circuit in Response of Carolina, Inc., et al., v. Leasco Response, Inc., No. 75-3052 (5th Cir., decided September 2, 1976), a copy of which is attached hereto. The decision is pertinent to the issues raised by the Petition, particularly in light of the Petitioners' Supplemental Memorandum

addressing another recent decision of that Court.

In Response of Carolina, Inc., the Fifth Circuit expressly concurred with the decision of the Third Circuit in the case at bar and comparable rulings of the Second Circuit (Slip. Op. at 5424). The decision thus refutes Petitioners' suggestion of a conflict among the Circuits.

Respectfully submitted,

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RESPONSE OF CAROLINA, INC., Florida Computer Response, Inc., Datatron Corporation, Response of Colorado, Inc., Plaintiffs-Appellants,

v.

LEASCO RESPONSE, INC., Defendant-Appellee.

LEASCO RESPONSE, INC., Plaintiff-Appellee,

v.

John WRIGHT, Defendant-Appellant.

No. 75-3052.

United States Court of Appeals, Fifth Circuit.

Sept. 2, 1976.

Franchisees of computer centers brought actions against franchisor for violation of antitrust laws. The United States District Court for the Southern District of Florida, at Miami, C. Clyde Atkins, J., granted preliminary injunctions to franchisees and the Court of Appeals, 498 F.2d 314, reversed and remanded. From judgment in favor of franchisor, franchisees appealed. The Court of Appeals, Dyer, Circuit Judge, held that evidence created jury question whether clause in contract providing for royalty payments to franchisor of 15% of monthly gross sales to customers within franchisee's area of primary responsibility and for 70% royalties for sales to customers outside of the area resulted in the imposition of territorial restrictions on sale of computer time by franchisees; that evidence failed to support claim that any of the franchisees were damaged by virtue of the alleged territorial restrictions where franchisor never billed or collected the 70% royalty on outside sales; and that with respect to tying claim, franchisees failed to introduce sufficient evidence to establish that their decision either to multiplex or purchaser computer hardware from franchisor was coerced.

Affirmed.

1. Monopolies ⇐12(1.10)

The word "every" in section of Sherman Act providing that every contract, combination or conspiracy in restraint of trade or commerce is illegal is not meant literally; rather the standard of reasonableness has been adopted to judge the lawfulness of the restraint. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

2. Monopolies ⇐17(1.3)

Where a territorial or customer "restriction" is created by contract, the Sherman Act's section one jurisdictional requirement is met and a per se violation exists whether or not the restriction has been enforced, much less firmly and resolutely enforced, unless it is otherwise sheltered by a decisional exception. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

3. Monopolies ⇐28(7.3)

Where a territorial or customer "restriction" is created by contract, the lack of enforcement is relevant in proof of fact of damage or causation required under the antitrust laws before treble damages may be recovered. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

4. Monopolies ⇐21.1(1)

Where vertical restraints taking the form of territorial limitations are contractually created, the "firm and resolute enforcement" of the limitations has no relevance to their legality. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

5. Monopolies ⇐28(8)

Evidence in actions by franchisees of computer centers against franchisor made question for jury whether the area of primary responsibility clause and provision for 15% royalty on sales inside the area and 70% on outside sales resulted in the imposition of territorial restrictions on sales of computer time by franchisees. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

6. Courts ⇐406.3(24)

When question as to whether vertical territorial restriction results in restraint of trade is one of degree rather than one of kind, the trier of fact is the most appropriate judge of the legality of the restraint. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

7. Monopolies ⇐28(7.3)

Evidence proffered by franchisee of computer service that it would take a loss on any sale it made outside of its area of primary responsibility if it paid franchisor the 70% royalty provided for in contract for sales outside of the area, as opposed to 15% royalty for sales inside the area, was admissible to show the effect of the 70% royalty on outside sales going to the question of converting territorial limitations into territorial restrictions. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

8. Monopolies ⇐28(7.1, 7.2)

In order to recover treble damages under the antitrust laws, a plaintiff must show a violation of the antitrust laws, the fact of damage and some indication of the amount of damage. Clayton Act, § 4, 15 U.S.C.A. § 15.

9. Monopolies ⇐28(1.7)

To be "liable" under the antitrust laws means that one has violated the antitrust laws and that the violation has resulted in an injury to the business or property of the plaintiff. Clayton Act, § 4, 15 U.S.C.A. § 15.

10. Monopolies ⇐28(1.7)

"Liability" for antitrust purposes means a showing of both an antitrust violation and fact of damage, and the meaning of "liability" does not change when a trial is bifurcated. Clayton Act, § 4, 15 U.S.C.A. § 15.

11. Monopolies ⇐28(8)

If trial of antitrust action is bifurcated between liability and damages, there must be some evidence showing a causal link between violation and alleged injury in phase I, before a plaintiff may enter phase II. Clayton Act, § 4, 15 U.S.C.A. § 15.

12. Monopolies ⇐28(7.6)

To show fact of damage from antitrust violation, plaintiffs need not show that the violation was the sole cause of the alleged injury; he need only show that it was a material cause. Clayton Act, § 4, 15 U.S.C.A. § 15.

13. Monopolies ⇐28(7.6)

Showing that antitrust violation was a material cause of the alleged injury may not be based on speculation; the required causal link between violation and injury must be proved as a matter of fact and with a fair degree of certainty. Clayton Act, § 4, 15 U.S.C.A. § 15.

14. Monopolies ⇐28(7.6)

Evidence in antitrust actions by computer service franchisees failed to support claim that any of the franchisees were damaged by virtue of alleged territorial restriction imposed by way of requirement that franchisees pay 70% royalty on sales outside their area of primary responsibility, as opposed to royalty of 15% on inside area sales, where franchisor never billed or collected the royalty. Clayton Act, § 4, 15 U.S.C.A. § 15.

15. Monopolies ⇐28(7.6)

Computer service franchisee's payment to franchisor of amounts past due and currently due in consideration for franchisor's waiver of the higher royalty for sales outside franchisee's area of primary responsibility was not a showing of fact of damage to franchisee by the alleged territorial restriction. Clayton Act, § 4, 15 U.S.C.A. § 15.

16. Monopolies ⇐28(7.6)

Computer service franchisee's increased sales after franchisee retained counsel and started selling outside of its area of primary responsibility did not establish the fact of damage from the alleged territorial restriction, particularly where the alleged "restriction" had not been shown to limit outside sales previously. Clayton Act, § 4, 15 U.S.C.A. § 15.

17. Federal Civil Procedure ⇐1961

Separate trials of "liability" and "damage" in antitrust cases must be grounded upon clear understanding between court and counsel of the issue or issues involved in each phase and what proof will be required to pass from one phase to the next. Fed.Rules Civ.Proc. rule 42(b), 28 U.S.C.A.; Clayton Act, § 4, 15 U.S.C.A. § 15.

18. Federal Civil Procedure ⇐1961

If at separate trial on issue of "liability" in antitrust case causation or fact of damage cannot be shown without some reference to the amount of damage, bifurcation should not prevent the reference. Fed.Rules Civ.Proc. rule 42(b), 28 U.S.C.A.; Clayton Act, § 4, 15 U.S.C.A. § 15.

19. Appeal and Error ⇐169

Reviewing court will not take note of error raised for the first time on appeal except where the interest of substantial justice is at stake.

20. Appeal and Error ⇐201(1)

Reviewing court would not take note of error raised by computer service franchisees that they were prejudiced by bifurcation of their antitrust action in that they were not able to show fact of damage at the first phase where over three weeks intervened between the bifurcation of issues and the beginning of the trial yet nothing was done to determine the boundaries of the bifurcation order, and franchisees understood the extent of their burden and the evidence excluded by the district court presumably because of the bifurcation order did not show any prejudice. Fed.Rules Civ.Proc. rule 42(b), 28 U.S.C.A.; Clayton Act, § 4, 15 U.S.C.A. § 15.

21. Monopolies ⇐28(7.4)

Evidence in support of tying claim of computer service franchisees against franchisor was insufficient to establish that franchisees' decision either not to multiplex or to purchase computer hardware from franchisor was coerced by franchisor. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

22. Monopolies ⇐17(2.5)

A tying agreement violates the Sherman Act whenever the party imposing the tie has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a not-insubstantial amount of interstate commerce is affected. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

23. Monopolies ⇐17(2.5)

To give rise to a tying agreement in violation of the Sherman Act, the economic power of the seller must actually

be utilized to coerce the purchase of the tied product; it is not enough to show that the seller has sufficient economic power and that two products were purchased together. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

24. Monopolies ⇐17(2.5)

If systems software purchased by computer service franchisees from franchisor was designed to only be compatible with a specific hardware configuration, and that specific hardware configuration, because it was based on information held only by franchisor, was only available from franchisor, then an illegal tie-in might be found, but such a violation must be limited to those instances where the technological factor tying the hardware to the software had been designed for the purpose of tying the products, rather than to achieve some technologically beneficial result. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

Appeal from the United States District Court for the Southern District of Florida.

Before DYER, SIMPSON and RONEY, Circuit Judges.

DYER, Circuit Judge:

This is an appeal from a judgment in favor of Leasco Response, Inc. (Leasco) in a suit brought by four of its former franchisees for alleged violations of the anti-trust laws. In a bifurcated trial, the district court directed a verdict for Leasco at the close of franchisees' case. The franchisees, Response of Carolina (Carolina), Florida Computer Response (Miami), Datatron Corporation (Datatron) and Response of Colorado (Denver) alleged that Leasco imposed territorial restrictions on their sale of computer time-sharing services and that Leasco tied the sale of the franchise to the lease of computer hardware from Leasco. The question presented here is whether, particularly in light of the bifurcated trial procedure, the district court erred in directing a verdict for Leasco, having found that there was no substantial evidence under the standard of *Boeing Co. v. Shipman*, 5 Cir. 1969, 411 F.2d 365 (en banc), to establish Leasco's antitrust liability. We affirm.

I.

Leasco entered the computer time-sharing business in 1969. Using a modified Hewlett-Packard 2000A central processing unit as the core of its system, it opened service branches in several major cities in the United States. The computer system was called "Response I."

In 1970, Leasco decided to franchise the Response I system. Its first franchise was opened in September, 1970, in Phoenix, Arizona. Two of the plaintiffs, Carolina and Datatron, began operations in Charlotte, North Carolina, and Louisville, Kentucky, respectively in June, 1971. The Denver plaintiff opened its doors in September, 1971, and the Miami plaintiff started in March, 1972.

The franchise agreement was called the Data Network Contract (DNC). While each of the four contracts involved in this case contained slight differences, their pertinent provisions are the same for all plaintiffs.

According to the DNC, Leasco granted to its franchisee the exclusive right to market Response Service [1] using franchise-controlled computer hardware, together with a license to use any rights that Leasco may have in the name "Response" within an area of primary responsibility.

The area of primary responsibility (APR) was described in an exhibit to each DNC, listing the counties within the area. Leasco agreed not to offer Response Service to any other person in the area except that Leasco was permitted to sell and solicit the sale of its time-sharing service to companies having offices both within and without franchisees' areas, so called "national accounts." Each franchisee agreed to "diligently promote the sale of Response Service" throughout the area of primary responsibility.

The DNC did not prohibit extra-territorial sales by franchisees. It provided for royalty payments to Leasco of 15 percent of monthly gross sales to customers within the area. However, the royalty was increased to 70 percent for sales to customers outside of the area.[2] It is this paragraph of the DNC which gives rise to the claimed territorial restriction.

"Response Service" provided under the DNC did not include computer hardware,[3] although it referred to a Hewlett/Packard computer.[4] In Paragraph 4 of the DNC Leasco stated its willingness to lease to franchisees the items of equipment listed in Exhibit B to the contract,[5] according to the terms of the lease also incorporated in Exhibit B. If this offer was accepted, Leasco agreed to set up and install the Response Equipment without charge on the franchisee's premises. Each franchisee signed an equipment lease for a term of 60 months.[6] As is explained more fully, *infra*, franchisees' tying argument centers around the lease of this equipment.

On June 21, 1973, Leasco filed suit against Carolina in a North Carolina state court to collect unpaid rentals, maintenance fees, and other amounts due under the lease and to recover possession of the leased equipment. One day later, Carolina filed suit in the United States District Court for the Southern District of Florida against Leasco alleging that Leasco violated the antitrust

1. Response Service is defined in the agreement as (a) Response I BASIC interactive time sharing via a Response I computer configuration centering around a Hewlett/Packard computer located on franchisee's premises; (b) Leasco's library of Response I computer time-sharing programs including application packages and (c) Leasco's technical operations and sales manuals, forms of incentive and compensation plans, branch operating manuals, and accounting and legal forms.

2. Specifically, Paragraph 10 of the DNC provides:

> "(b) [Franchisee] shall pay to Leasco an amount equal to fifteen (15%) percent of [franchisee's] monthly gross sales . . during each month of the term hereof.
>
> (c) [Franchisee] shall pay to Leasco a commission at the rate of seventy (70%) percent of [franchisee's] monthly gross sales attributable to sales of [franchisee's] Response Service to third parties, which third parties are located outside of [franchisee's] Area."

3. A description of the relationship between the hardware and software components of the computer system appears in Part IV, *infra*.

4. See footnote 1, *supra*.

5. In the Carolina and Datatron DNC's, Exhibit B listed the following equipment: a Hewlett/Packard Model 2000A central processing unit, power supply, memory extender, tape reader, teleprinter, drum memory, magnetic tape unit, and disk controller. Added to these in the Miami and Denver leases were a disk drive, disk packs, terminals, couplers, Ohio Brass cables, and data communications cables.

6. The rental payment schedule was the same for the four franchisees: $2,500 per month for the first 12 months; $4,206 per month for the next 12 months, and $5,252 per month for the final 36 months. In addition, each franchisee bore the risk of loss of the equipment and agreed to carry insurance on the equipment at the cost of $500 per year.

laws[7] by (1) the imposition of territorial restrictions on the area within which Carolina might sell Response Service, by exacting 70 percent of monthly gross sales to customers outside of Carolina's area of primary responsibility; (2) price fixing; (3) discriminatorily favoring its branches over its franchises; and (4) attempted monopolization.[8] On August 3, 1973, Miami filed suit against Leasco on similar grounds. Datatron's complaint followed on August 16, 1973, and Colorado's was filed on August 20, 1973.[9] No allegations of a tying arrangement were made in any of the complaints. On April 16, 1974, the cases were consolidated.

Extensive discovery was had by all parties in 1973 and the first nine months of 1974. On October 15, 1974, the parties filed a pre-trial stipulation wherein they agreed on no issues of fact or law. However, in this document both franchisees and Leasco stated that a tying claim was an issue to be considered at trial.[10]

On October 18, 1974, at a pre-trial conference the district court stated that it was its disposition "to try liability first and then go to damages," using the same jury.[11] Leasco objected to this bifurcation procedure, but there was no discussion of the objection by the district court. Later in the conference, franchisees' counsel asked whether an order would be entered as to the separation of the trial into two stages. The district court stated simply that liability would be tried first. There was no other discussion by the district court and counsel of this decision anywhere in the pre-trial record.

On November 11, 1974, the trial commenced and plaintiffs concluded presentation of their evidence on February 20, 1975. On February 28, 1975, the district court heard arguments on Leasco's motion for a directed verdict on the antitrust and fraud counts of the complaints.[12] On March 3, 1975, the district court granted Leasco's motion with respect to all antitrust issues raised by franchisees. It denied the motion with respect to the fraud issues and the trial proceeded. After a jury verdict for Leasco on the fraud counts[13] the district court entered its final judgment in favor of Leasco.

Franchisees' motions for a new trial asserting error in directing a verdict for Leasco on the antitrust claims were subsequently denied and they appealed. They address their appeal solely to the propriety of the district court's directed verdict for Leasco on the territorial restriction and tying claims.

II.

The district court found that "firm and resolute" or, at least, some measure of enforcement of a vertical territorial restriction is necessary to rend it actionable. Since it found no evidence of enforcement, it directed a verdict in Leasco's favor on this alleged antitrust violation. Franchisees contend that this was error.

[1] Section one of the Sherman Antitrust Act, 15 U.S.C.A. § 1, provides that "every contract, combination . . . or conspiracy in restraint of trade or commerce . . . is . . . illegal." "Every" is not meant literally; rather the standard of reasonableness has been adopted to judge the lawfulness of the restraint, *Standard Oil Co. v. United States*, 1911, 221 U.S. 1, 66, 31 S.Ct. 502, 55 L.Ed. 619; *Chicago Board of Trade v. United States*, 1918, 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683.

Certain practices have such a "pernicious effect on competition," *Northern Pacific Ry. Co. v. United States*, 1958, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545, that they are considered to be per se violations of Section one.[14] Vertical territorial restraints were excluded from that category initially, *White Motor Co. v. United States*, 1963, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738, but later were included, *United States v. Arnold, Schwinn & Co.*, 1967, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249.

In *White Motor*, the Supreme Court was faced for the first time with territorial and customer restrictions. White Motor's agreement with its distributors and dealers expressly limited the territory within which and the customers to whom they might sell trucks and parts. The Supreme Court held that the legality of these vertical restraints should be determined only after a trial since it did not know enough about the "economic or business stuff out of which these arrangements emerge" to be certain of their purpose or effect. "We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' . . . and therefore should be classified as per se violations of the Sherman Act." 372 U.S. at 263, 83 S.Ct. at 702.

Four years later in *Schwinn*, the legality of such restraints suffered the opposite fate. *Schwinn* had two principal methods of selling its bicycles. It sold to retailers by means of consignment or agency arrangements with 22 distribu-

7. The antitrust laws vest exclusive jurisdiction in the federal courts, 15 U.S.C.A. § 4. Therefore, an antitrust defense could not have been raised by Carolina in Leasco's state action.

8. The complaint also alleged various fraud claims and a breach of contract.

9. After the filing of the Carolina and Datatron complaints, the district court issued a preliminary injunction against Leasco to prevent it from prosecuting the state court case against Carolina and from taking any action which would result in the termination of Datatron's business. This Court reversed that judgment. *Response of Carolina v. Leasco Response, Inc.*, 5 Cir. 1974, 498 F.2d 314.

10. As mentioned earlier, franchisees never plead the issue of tying. They attempted to do so in an amended complaint filed April 11, 1974, but the district court refused leave to amend on June 14, 1974. In the pre-trial stipulation, Leasco stated its objection to treating tying as an issue at trial since it had not been plead. The district court permitted trial of the tying issue, however, because of the broad discovery conducted by both sides and because the alleged prejudice to Leasco did not rise to the level described in *Hodgson v. Colonnades*, 5 Cir. 1973, 472 F.2d 42, 48. Leasco does not contend that this ruling was erroneous.

11. It appears that the district court took this action *sua sponte*, which is not impermissible, F.R.Civ.P. 42(b).

12. Franchisees voluntarily withdrew their breach of contract claims at the end of their case.

13. Leasco had counterclaimed for unpaid royalties from franchisees and the jury also found in its favor in this respect. Franchisees have not appealed from the judgment entered upon the jury verdicts on the fraud claim and Leasco's counterclaim.

14. Among them are included price-fixing, *United States v. Trenton Potteries*, 1927, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700; tying arrangements, *International Salt Co. v. United States*, 1947, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20; division of markets, *Timken Roller Bearing Co. v. United States*, 1951, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199; group boycotts, *Fashion Originators' Guild v. FTC*, 1941, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949, and resale price maintenance, *United States v. Parke, Davis and Co.*, 1960, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505.

tors under the so-called Schwinn Plan which involved direct shipment by Schwinn to the retailer with Schwinn invoicing the retailer, extending credit, and paying a commission to the distributor taking the order. And it sold bicycles to distributors who maintained an inventory to supply retailers with emergency and "fill-in" requirements.[15] Schwinn assigned specific territories on an exclusive basis to each distributor. It instructed each distributor to sell only to franchised Schwinn retailers in their respective territories. Each franchised retailer was to purchase only from or through the distributor authorized to serve his particular area and was to sell only to consumers and not to unfranchised retailers.

The Court held that where a manufacturer sells products to his distributor subject to territorial or customer restrictions upon resale, a per se violation of the Sherman Act results. "Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it." 388 U.S. at 379, 87 S.Ct. at 1865. Hence, Schwinn was enjoined from limiting the freedom of its distributors and retailers who buy products from Schwinn to dispose of the products "where and to whomever they choose." *Id.* at 378, 87 S.Ct. at 1865.

With respect to consignment or agency sales by Schwinn the Court held that, under the rule of reason, where Schwinn retains all indicia of ownership, including title, dominion, and risk of loss and so long as the dealers in question are indistinguishable in function from agents or salesmen, the vertical territorial restriction was not an "unreasonable" restraint of trade. 388 U.S. at 381, 87 S.Ct. at 1856.

The critical element of a "contract, combination, or conspiracy," easily found in *White Motor* because of the express contractual territorial restriction, was not clearly identified by the Court in *Schwinn.* The Court did not quote the language of any of the agreements between Schwinn and its distributors and retailers so there does not appear to have been an express contractual restriction. Justice Stewart's dissenting opinion supports this view when it states that Schwinn's distribution policy was "implemented largely through request and persuasion by Schwinn." 388 U.S. at 385, 87 S.Ct. at 1868. And the majority opinion made clear that there were no horizontal overtones to the restrictions in issue:

> [W]e are dealing here with a vertical restraint embodying the unilateral program of a single manufacturer. We are not dealing with a combination . . . of distributors . . . . We are not dealing with a "division of territory in the sense of an allocation by and among the distributors, . . . or an agreement among distributors to restrict their competition . . . . We are here concerned with a truly vertical arrangement, raising the fundamental question of the degree to which a manufacturer may not only select the customers to whom he will sell, but also allocate territories for resale and confine access to his product to selected, or franchised, retailers. 388 U.S. at 378, 87 S.Ct. at 1865.

15. For a more detailed description of the Schwinn distribution policy, *see* Pollock, Alternative Distribution Methods After *Schwinn*, 63 Nw.U.L.Rev. 595, 596–97.

With respect to transactions in which distributors purchased bicycles for resale, at least, the district court expressly found a conspiracy between the distributors and Schwinn to restrain trade. 388 U.S. at 371, 87 S.Ct. 1856. However, the district court's finding of a conspiracy did not embrace agency or consignment sales by distributors. And with respect to the restrictions on retailers, the district court stated that the Schwinn franchising program "'was conceived, hatched and born into life . . . in the minds of the Schwinn officials,' and agreed that 'the action was unilateral in nature.'" 388 U.S. at 391, 87 S.Ct. at 1871, fn. 12 (Stewart, J., dissenting).

The Court does not tell us in *Schwinn* the source of the necessary contract, combination or conspiracy with respect to the territorial restrictions on distributors when acting as agents or consignees and the customer restrictions on retailers. According to Justice Stewart's dissent, the "firm and resolute enforcement" language of the majority opinion was intended to satisfy—in his view, unsatisfactorily—the Sherman Act jurisdictional requirement of an agreement for these two practices. 388 U.S. at 391, 87 S.Ct. 1856, fn. 12. The district court had rejected the government's contentions that Schwinn in fact cancelled the franchises of some retailers because of sales to unauthorized customers and that distributors had been cut off because of sales to unauthorized customers in violation of territorial limitations. The government argued to the Court that these findings were clearly erroneous. The Court stated:

> In any event, it is clear and entirely consistent with the District Court's findings that Schwinn has been "firm and resolute" in insisting upon observance of territorial and customer limitations by its bicycle distributors and upon confining sales by franchised retailers to consumers, and that Schwinn's "firmness" in these respects was grounded upon the communicated danger of termination. Our analysis will embrace this conclusion, rather than the finding which is urged by the Government and which was refused by the trial court that Schwinn actually terminated retail franchises or cut off distributors for the suggested reasons. 388 U.S. at 372, 87 S.Ct. at 1862.

Thus, despite the unilateral nature of the distribution policies of Schwinn, Schwinn's enforcement of the policies acquiesced in by both the franchised retailers and wholesale distributors amounted to a contract, combination, or conspiracy for Sherman Act purposes.[16]

16. This approach to determining the existence of the jurisdictional element of a "contract, combination, or conspiracy" was also used in *United States v. Parke, Davis & Co.*, 1960, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505. Parke, Davis had announced a resale price maintenance policy and stated that it was Parke, Davis' continuing policy to deal with drug wholesalers who observed the schedule of prices. Had it done no more, *United States v. Colgate*, 1919, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992, would have prevented the finding of an "agreement" necessary to trigger the Sherman Act. But it used the refusal to deal policy "to elicit" wholesalers' willingness to deny products to retailers who refused to adhere to the price policy thereby creating "a combination with the retailers and the wholesalers to maintain retail prices." 362 U.S. at 45, 80 S.Ct. at 512. Threats of termination secured the retailers' acquiescence in the suggested prices. The wholesalers cooperated by terminating the price-cutting retailers. Each resulted in separate—"concerted action induced by the manufacturer"—combinations violative of the Sherman Act. *Cf. FTC v. Beech-Nut Packing Co.*, 1921, 257 U.S. 441, 455, 42 S.Ct. 150, 66 L.Ed. 307; *United States v. Schrader's Son*, 1920, 252 U.S 85, 99–100, 40 S.Ct. 251, 64 L.Ed. 471.

Albrecht v. Herald Company, 1968, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998, confirms this view. Albrecht was a newspaper carrier for respondent newspaper company. All carriers had exclusive territories subject to termination if prices exceeded respondent's advertised suggested maximum price. Albrecht adhered to the advertised price for some time but then raised his prices. Respondent objected to no avail and later wrote Albrecht to inform him that it was writing to subscribers on his route to offer them the newspaper at the lower price. Respondent also hired a circulation company to engage in a solicitation of customers along Albrecht's route. Respondent continued to sell newspapers to Albrecht but warned him it would stop doing so if he continued to overcharge. In addition, resident found a carrier, Kroner, to deliver papers to respondent's customers, most of whom were previously Albrecht's. Albrecht sued charging a combination between respondent and Albrecht's customers or the circulation company or Kroner. The jury found for respondent and a motion for a judgment notwithstanding the verdict was denied. The court of appeals affirmed the denial in part on the ground that respondent's action was unilateral.

Relying on *United States v. Parke, Davis & Co.*, 362 U.S. at 45–47, 80 S.Ct. 503,[17] the Supreme Court reversed, finding a combination between respondent, the circulation company, and Kroner to force Albrecht to conform to the advertised retail price. In a footnote, the Court stated that under *Parke, Davis,* Albrecht could have claimed a combination between respondent and himself, "at least as of the day he unwillingly complied with respondent's advertised price." "Likewise," said the Court citing *Schwinn's* discussion of firm and resolute enforcement, "he might successfully have claimed that respondent had combined with other carriers because the firmly enforced price policy applied to all carriers, most of whom acquiesced in it." 390 U.S. at 150, 88 S.Ct. at 872, fn. 6. Reliance on *Schwinn* makes it clear that the firm and resolute language in that opinion was meant to show the existence of an agreement.

The post-*Schwinn* treatment of the "firm and resolute enforcement" language of the Court has followed an erratic course. We chart it to explain our holdings, *infra*, on the existence of a violation here.

Janel Sales Corp. v. Lanvin Parfums, Inc., 2 Cir. 1968, 396 F.2d 398, *cert. denied*, 393 U.S. 938, 89 S.Ct. 303, 21 L.Ed. 275, involved an express contractual customer restriction where the "retailer" agreed to sell certain "commodities" only to "consumers for use." Plaintiffs argued that this was a per se violation of the Sherman Act § 1. The jury found that there was no agreement on customer restrictions and the court upheld this finding saying that "firm and resolute" insistence on compliance with the restriction was necessary before a violation could be found.[18] *Id.* at 406.

Three years later, in *Beverage Distributors, Inc. v. Olympia Brewing Company*, 9 Cir. 1971, 440 F.2d 21, *cert. denied*, 403 U.S. 906, 91 S.Ct. 2209, 29 L.Ed.2d 682, plaintiff beer distributor argued that defendant brewing company had imposed territorial restrictions upon the resale of its beer. However, the distributorship agreement contained no reference to territorial restrictions. Hence, plaintiff was faced with the same dilemma as the government in *Schwinn*: the need to show a contract, combination or conspiracy. The jury found that there was none of these and the court held that there was sufficient evidence to support the verdict, concluding that "if there was any restraint on plaintiff it was self imposed." *Id.* at 30–31.

17. See footnote 16, *supra*.

18. *Janel Sales* has sprouted offspring, see, e. g. *United States v. Empire Gas*, W.D.Mo.1975, 393 F.Supp. 903, 911 ("unenforced agreements, even when proven, do not violate the Sherman Act"), cf. *Stan Togut Corp. v. Hobart Mfg. Co.*, S.D.N.Y.1974, 398 F.Supp. 1323, 1326–27.

Next, in *Colorado Pump & Supply Co. v. Febco, Inc.*, 10 Cir. 1973, 472 F.2d 637, *cert. denied*, 411 U.S. 987, 93 S.Ct. 2274, 36 L.Ed.2d 965, plaintiff and defendant Thompson were competing wholesale distributors of defendant Febco's products. Febco then entered into an exclusive distributorship with Thompson which authorized Thompson "to sell within the following territory (Colorado and some adjacent areas)." As a result of this arrangement, plaintiff could not buy directly from Febco and had to buy from Thompson at a lesser discount than it had been receiving from Febco. The court stated that the territorial limitation did not mention outside sales and the testimony was that outside sales could have been made, though none had been. It concluded that the limitation created no more than an area of primary responsibility,[19] and, relying on *Janel Sales Corp., supra*,[20] the court found no firm and resolute enforcement of any territorial restriction.

About a year later, in *Good Investment Promotions, Inc. v. Corning Glass Works*, 6 Cir. 1974, 493 F.2d 891, alleged customer restrictions were in issue. The district court had granted a summary judgment to plaintiff relying on the per se rule of *Schwinn*. The court of appeals reversed saying, in part, that the record is "devoid of any information from which it may be determined that '. . . firm and resolute [insistence] upon observance of . . . customer limitations' was required by Corning, such as was the situation in *Schwinn*." *Id.* at 893. It is unclear from the opinion whether the court was treating the firm and resolute language as necessary to establish an agreement in the absence of a contractual restriction or whether it was treating it as a defense to the charge of violation.

In *Copper Liquor, Inc. v. Adolph Coors Co.*, 5 Cir. 1975, 506 F.2d 934, we were faced with an express territorial restriction in which a beer distributor promised to conduct his distribution exclusively within a prescribed territory. Referring to the "firm and resolute" language as an "exception" we did not consider its significance because it was "apparent" that Coors had been firm and resolute in

19. The court actually referred to the contract provision as describing no more than "a primary marketing territory." The distinction may not be a gossamer one: a contract which authorizes one to sell in the described territory may, depending upon the circumstances, give rise to different inferences than one which requires use of one's best efforts to sell in the described territory. This appears to be the basis for Judge Murrah's dissent, 472 F.2d at 641–42.

20. The reliance on *Janel Sales* is misplaced. *Janel Sales* involved an express contractual restriction whereas the Febco distributorship agreement created an APR, not the equivalent of an express restriction. The citation of *Janel Sales* is even more curious because the court distinguished *Schwinn* saying: "Our case is different from Schwinn. We have no explicit contract restriction." 472 F.2d at 639. Aside from the fact that there was no explicit contractual restriction in *Schwinn*, if this was the basis for the distinction, then *Janel Sales* should have been similarly distinguishable.

enforcing the territorial restrictions. *Id.* at 944.

Four months later the Eighth Circuit decided ***Reed Brothers, Inc. v. Monsanto Co.***, 8 Cir. 1975, 525 F.2d 486, *cert. denied*, 423 U.S. 1055, 96 S.Ct. 787, 46 L.Ed.2d 645 which involved (1) an area of primary responsibility clause, (2) a shipping and pick-up policy which provided that deliveries would only be made to destinations within the APR and pick-ups would be accepted only at Monsanto warehouses within the ordering distributor's APR and (3) a rebate program whereby a distributor would receive a rebate on all Monsanto herbicides sold directly to retailers (as opposed to wholesalers or discounters). The jury found for plaintiff wholesaler.[21] However, the district court granted Monsanto's motion for a judgment n. o. v. because there was insufficient evidence of a contract, combination or conspiracy between Monsanto and its distributors to restrict the sale of herbicides to retailers in assigned territories. Monsanto's attempt to defend this position failed. Relying on *Parke, Davis & Co., supra*, the court of appeals stated that Monsanto's "legitimate" APR contract formed the base for an illegitimate agreement to restrict territorial and customer sales. It held that there was sufficient evidence to show that Monsanto firmly and resolutely enforced territorial restrictions by means of its shipping and pick-up policy, 525 F.2d at 495–96. In addition to this evidence "relating to the way in which Monsanto's shipping policy change acted as a coercive tool for enforcing its primary area of responsibility contract," the court found "clear evidence" that its rebate program was a "cooperative" one amounting to a contract, combination or conspiracy, 525 F.2d at 496–97. Therefore, the court upheld the jury's finding. *Cf.* ***Beverage Distributors, Inc. v. Olympic Brewing Co., supra***. The Court went on to hold that the conflicting evidence in the record as to whether the effect of the agreement was to prohibit distributors from selling to Reed inside or outside of assigned territories, *i. e.*, to restrain trade, was for the jury to weigh and that the evidence was sufficient for the jury to find that "Monsanto made rebate policies and enforced its 'area of primary responsibility' contracts through shipping policies which had the effect of restricting its distributors in the resale of its products." *Id.* at 498. *Cf. Knutson v. Daily Review, Inc.*, N.D.Cal.1974, 383 F.Supp. 1346, 1368–69.

The *Reed* court properly used the firm and resolute language to support a finding of an agreement. This was also done in ***World of Sleep v. Stearns & Foster Co.***, 10 Cir. 1975, 525 F.2d 40, but with the opposite result. Defendant sold bedding products to plaintiff in Denver. There was no contract or agreement of any kind involved. Plaintiff opened a store in Atlanta and requested that defendant sell to it there. Defendant refused, citing its loyalty to another department store in Atlanta. Hence, plaintiff began to ship defendant's products from its Denver store to its Atlanta store. After an unavailing protest, defendant stopped selling bedding products to plaintiff. The plaintiff sued and the jury found for defendant. The court interpreted the per se rule of *Schwinn* as follows: "where a manufacturer . . *sells* his product to a distributor . . and in connection with such sale 'firmly and resolutely' subjects the distributor to territorial restrictions upon resale, whether by 'explicit agreement or silent combination or understanding with his vendee', a per se violation of the Sherman Act results." *Id.* at 44. The court properly equated "firm and resolute enforcement" with the Section one requirement of an agreement despite the Tenth Circuit's earlier ambiguous decision in *Colorado Pump & Supply Co., supra.*[22]

The Tenth Circuit decided *Redd v. Shell Oil Co.*, 10 Cir. 1975, 524 F.2d 1054, *cert. denied*, – U.S. , 96 S.Ct. 1508, 47 L.Ed.2d 762, four days later which involved an agreement containing "clear restrictions on the area within which plaintiff could sell." *Id.* at 1057. Although an apparent contractual resale restriction existed, the court, notwithstanding what appears to be a clear holding in *World of Sleep*, relied on *Colorado Pump* and *Janel Sales* in holding that there must be firm and resolute enforcement action "in addition to contractual provisions for territorial restrictions," *Id.* at 1058, before an antitrust violation exists.

In our decision in ***Eastex Aviation, Inc. v. Sperry & Hutchison Co.***, 5 Cir. 1975, 522 F.2d 1299, which involved explicit contractual customer restrictions on resale of S & H green stamps, we characterized the "firm and resolute" cases as decisional exceptions to *Schwinn* but did not analyze their meaning because we found that the restrictions were enforced. *Id.* at 1307.

Finally, in ***Pitchford v. Pepi, Inc.***, 3 Cir. 1976, 531 F.2d 92, cert. denied —— U.S. ——, 96 S.Ct. 2649, 49 L.Ed.2d 387, 44 L.W. 3714, a manufacturer of electronic equipment imposed explicit territorial restrictions by contract upon plaintiff distributor. The court upheld the jury's finding of a per se violation of the Sherman Act under *Schwinn*, once it found that there was enough evidence (1) to show that plaintiff purchased goods for resale and (2) to enable a jury to find that defendants enforced their territorial policy. The decision is complicated somewhat by an alternative holding that a horizontal division of markets existed "even if the *Schwinn* prohibition of vertical restraints were not dispositive." *Id.* at 104.

In our view, none of these cases have analytically dealt with the difference between Schwinn's territorial "restriction" and various post-*Schwinn* "limitations" and the importance of an express agreement containing either the restriction or limitation.

Schwinn's territorial "restriction" absolutely barred distributors from making extra-territorial sales. However, because this restriction was not contractually created, the Court determined that a contract, combination or conspiracy existed because of Schwinn's firm and resolute enforcement of the restrictions and the distributors' inferable acquiescence therein.

[2, 3] Where a territorial or customer "restriction" is created by contract, the Sherman Act's Section one jurisdictional requirement is met and a per se violation exists whether or not the restriction has been enforced, much less firmly and resolutely enforced, unless it is otherwise sheltered by a decisional exception to *Schwinn*.[23] Hence, we cannot subscribe

21. Plaintiff also sued in the capacity of a terminated dealer. But the court held that his poor sales record in his area of primary responsibility justified his termination, 525 F.2d at 494.

22. See footnote 20, *supra*.

23. The court in *Schwinn* "observed" that the facts did not come within "the specific illustrations which the Court in *White Motor* articulated as possible factors relevant to a showing that the challenged vertical restraint is sheltered by the rule of

to the reasoning of cases like *Janel Sales* and *Redd*.[24]

[4] However, most post-*Schwinn* vertical restraints, not surprisingly, have taken the form of territorial "limitations": arrangements which do not bar extra-territorial sales but may inhibit them. Where these limitations are contractually created, see *Colorado Pump & Supply Co., supra*, the "firm and resolute enforcement" language of *Schwinn* has no relevance to their legality.[25]

[5, 6] We turn now to the correctness of the district court's directed verdict for Leasco on the existence of an antitrust violation. The district court held that "some measure of enforcement of a vertical territorial restriction, at least in a franchise context, must take place to render such a restriction actionable." Finding no evidence of enforcement, it directed a verdict for Leasco. As the foregoing discussion makes clear, this holding was error.[26] There was a contract between the parties containing a vertical limitation accompanied by a disparate royalty for inside and outside-area sales. Proof of enforcement was not necessary to show the existence of an agreement as it was in *Schwinn*. The question which should have been asked is whether, considering the evidence in the light most favorable to the franchisees, there was evidence "of such quality and weight that reasonable men in the exercise of impartial judgment might reach different conclusions," *Boeing Co. v. Shipman, supra*, 411 F.2d at 374, to create a jury question on whether the Leasco APR clause and the 70 percent royalty on outside sales resulted in fact in the

reason because it is not anticompetitive. Schwinn was not a newcomer, seeking to break into or stay in the bicycle business. It was not a 'failing company.'" 388 U.S. at 374, 87 S.Ct. at 1863.

We have recognized that this language may give rise to exceptions to the *Schwinn* per se rule. *Eastex Aviation, Inc. v. Sperry & Hutchinson, supra*, 522 F.2d at 1307, fn. 13; *Copper Liquor, Inc. v. Adolph Coors Co., supra*, 506 F.2d at 943; see also, *GTE Sylvania, Inc. v. Continental T.V., Inc.*, 9 Cir. 1976, —— F.2d ——, ——, fn. 41. Cf. *Brown Shoe Co. v. United States*, 1962, 370 U.S. 294, 330, 82 S.Ct. 1502, 8 L.Ed.2d 510; *United States v. Jerrold Electronics Corp.*, W.D.Pa.1960, 187 F.Supp. 545, 560–61, *aff'd*, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806. Rather than outline exceptions (other than the "failing company" and "new entrant" ones) to *Schwinn* found by other courts, we simply note the literature on the subject. Comment, Territorial Restrictions under the Sherman Act: Confusion in the Aftermath of *Schwinn*, 47 Miss.L.R. 239, 250–57 (1976); Izard, Staton and Ross, Of Bicycles and Beer: Vertical Territorial and Customer Restraints from *Schwinn* to *Coors*, 26 Mercer L.R. 507, 512–24 (1975); Note, Vertical Territorial and Customer Restrictions in the Franchising Industry, 10 Col.J. of Law. and Soc. Probs. 497, 505–11 (1974); Note, Vertical Territorial and Customer Restrictions under the Sherman Act: Decisions since *United States v. Arnold, Schwinn & Co.*, 22 J. of Pub.L. 483, 488–97 (1973).

24. See also *Pitchford v. Pepi, Inc., supra*. This is not to say that the lack of enforcement is not relevant. To the contrary, it will play a powerful part in the proof of fact of damage or causation required under the antitrust laws before treble damages may be recovered, see Part III, *infra*.

25. But see TAN 27–29 and fn. 30, *infra*, and *Reed Bros. v. Monsanto, supra*. Where neither a restriction nor a limitation is expressed in the contract, the firm and resolute approach would be available. See *Noble v. McClatchy Newspapers*, 9 Cir. 1975, 533 F.2d 1081, 1089–90; *Beverage Distributors, Inc. v. Olympia Brewing Co., supra*, *World of Sleep v. Stearns & Foster Co., supra*. Cf. *Knutson v. Daily Review*, N.D.Cal.1974, 383 F.Supp. 1346, 1368 (contract was "ambiguous" with respect to the existence of a limitation).

26. The lack of enforcement of the 70 percent royalty on outside area sales, however, is quite relevant to a showing of damage, Part III, *infra*.

imposition of territorial restrictions on the sale of computer time by its franchisees.[27] We hold that there was. In our view, these contract terms were sufficient to create a jury question. The APR clause itself is unobjectionable. However, the disparity between the 15 percent royalty on inside area sales and 70 percent on outside sales was so great[28] that, taken together with the APR, a jury could infer that territorial restrictions were being imposed by Leasco.[29]

[7] There was other evidence to support this inference. Leasco inter-office memoranda stated that the royalty payment of 70 percent served the purpose of deterring or dissuading outside sales. The former Leasco Director of Finance testified that Harris, one of the architects of the Leasco franchise system, told him that the purpose of the 70 percent royalty was to dissuade the franchisees from going out of their territory. And at least with respect to Datatron there was proffered testimony that it would take a loss on any sale it made outside of its area if it paid Leasco the 70 percent royalty.[30]

However, our holding that the district court erred in directing a verdict for Leasco on the existence of territorial restrictions does not end our inquiry, for the district court also held that the franchisees failed to show the fact of damage required to support an award of treble damages under the antitrust laws. It is this ruling to which we now turn our attention.

III.

[8, 9] In order to recover treble damages under the antitrust laws, a plaintiff must show a violation of the antitrust laws, the fact of damage, and some indication of the amount of damage. *Terrell v. Household Goods Carriers' Bureau*, 5 Cir. 1974, 494 F.2d 16, 20, 15 U.S.C.A. § 15. To be "liable" under the antitrust laws, therefore, means that one has violated the antitrust laws and that violation has resulted in an injury to the business or property of the plaintiff, *i. e.*, there was fact of damage.

Franchisees vigorously contest this conclusion. They argue that "liability" should be equated with "violation," generally, or, at least in a bifurcated trial. They say this Court held as much in *Copper Liquid v. Adolph Coors, Inc., supra*.

27. Cf. *Hobart Brothers Co. v. Gilliland Inc.*, 5 Cir. 1973, 471 F.2d 894, 900. Whether Leasco has parted with dominion, title and risk of loss in this context is not seriously questioned or else it, too, would be part of the inquiry on a motion for directed verdict.

28. We resist the temptation to hold that the contract provisions on their face amount to a per se violation. The defendant should be given the opportunity to prove that the disparity does not result in a restraint of trade, rather than having us determine how much is too much. When the question is one of "degree" rather that one of "kind," as here, the trier of fact is the most appropriate judge of the legality of the restraint.

29. Cf. *Knutson v. Daily Review, supra*, 383 F.Supp. at 1368–69 where the contract was ambiguous with respect to the existence of a restriction or a limitation and the court found the evidence insufficient to establish an illegal restriction. See also *Noble v. McClatchy Newspapers, supra*, 533 F.2d at 1089–90.

30. This evidence was proffered by Datatron since the district court refused to admit it. In our view, the evidence was admissible to show the effect of the 70 percent royalty on outside sales going to the question of converting territorial limitations into territorial restrictions.

Next, they argue that they have shown sufficient evidence of fact of damage to avoid a directed verdict under *Boeing Co. v. Shipman.* Finally, franchisees contend that if they have not shown fact of damage, it is because they were prejudiced in the presentation of evidence of it by the district court's bifurcation order. We reject all of these contentions.

[10] *Terrell* establishes that "liability" for antitrust purposes means a showing of both an antitrust violation and fact of damage. It involved a conspiracy by defendants to eliminate Terrell as a competitor in the preparation and dissemination of mileage guides. Terrell prevailed in a jury trial but this Court *en banc* reversed the judgment of the district court with respect to the award of damages. We deemed it unnecessary to require a retrial on the issue of defendant's liability because there was "ample evidence to support a finding by the jury that the Sherman Act has been violated." 5 Cir., 452 F.2d 152, 160. After a jury verdict for Terrell on remand, the defendants argued that evidence of fact of damage was required on retrial and was insufficient to support the verdict. We disagreed, recognizing that in a private antitrust action, "there is no neat dividing line between the issues of liability and damages," but holding that the *en banc* decision affirming the trial court on the issue of liability "necessarily encompassed the findings [of the jury] on the legal violation and causation or fact of damage." 494 F.2d at 21.

Nothing that we said in *Coors* is to the contrary. There we found sufficient evidence to support the jury's finding of an antitrust violation, but found insufficient evidence to show that the violation caused plaintiff the injury alleged. The trial was not bifurcated in the district court. There was no issued raised as to meaning of the word "liability." We simply recognized that two elements exist before damages may be awarded under the antitrust laws but we found only one of them present. The fact that we remanded the case for a new trial on the issue of fact of damage was not a holding that the "fact of damage" belongs in Phase II of a bifurcated trial on liability and damages. Franchisees' attempt to read *Coors* in this manner takes the holding of that case beyond its contours.

[11] Nor does the meaning of "liability" for antitrust purposes change when a trial is bifurcated.[31] We perceive no basis in law or logic to give "liability" different meanings depending upon the trial procedure used. While we recognize that a finding of "liability" in phase I of a bifurcated trial is interlocutory, *Haverhill Gazette Co. v. Union Leader,* 1 Cir. 1964, 333 F.2d 798, 803, *cert. denied,* 379 U.S. 931, 85 S.Ct. 329, 13 L.Ed.2d 343,[32] cf. *Wall Products Co. v. National Gypsum Co.,* N.D.Cal.1971, 326 F.Supp. 295, 296 (*Wall I*) and 357 F.Supp. 832, 835 (*Wall II*),[33] this in no way diminishes the requirement that a plaintiff show some evidence that the violation caused him injury before a defendant is found "liable." Put in other terms, if the trial is bifurcated between liability and damages, there must be some evidence showing a causal link[34] between the violation and alleged injury in phase I, before a plaintiff may enter phase II.

[12, 13] To show fact of damage, an antitrust plaintiff need not show that the violation was the sole cause of the alleged injury. He need only show that it was a material cause. *Zenith Radio Corp. v. Hazeltine Research,* 1969, 395 U.S. 100, 114, 89 S.Ct. 1562, 23 L.Ed.2d 129, fn. 9. However, this showing may not be based on speculation. The required causal link must be proved "as a matter of fact and with a fair degree of certainty." *Terrell v. Household Goods Carriers' Bureau, supra,* 494 F.2d at 20.[35]

[14] Each franchisee had the task, therefore, of demonstrating that the alleged territorial restriction materially contributed to some injury to its business as a matter of fact and with a fair degree of certainty. We hold that under *Boeing* the evidence fails to support a claim that any of the franchisees were damaged by virtue of the alleged territorial restriction.

The principals in the Carolina franchise were Crane, Robert Johnson, and Mummaw. Their testimony belies Carolina's claim that it was damaged in any way by the territorial restriction.

Crane testified that Harris, one of the organizers of the Leasco franchise system, told him that he didn't have to worry about the 70 percent clause if he found a customer outside of his territory. Carolina had customers outside of its territory, and it made sales efforts out of its territory. Carolina complains of Leasco's characterization of these sales and sales efforts as "persistent" and "repeated" but it doesn't matter, in our view, how they are characterized. The facts are that they were made, and that Leasco knew they were made. Despite this knowledge, Leasco never billed or collected the 70 percent royalty on outside sales. In addition, when Carolina defaulted on its obligations under the DNC, Leasco did not make a claim of default with respect to the 70 percent royalty clause.

Johnson's testimony suggested that the time and expense of outside solicitations rather than the territorial restrictions was the primary reason for not selling outside of Charlotte. Mummaw testified that he did not "actively" sell out of his territory. However, he also stated that the expense of long distance phone lines was eliminated with a local computer time-sharing company and that long distance charges were, in part, the

31. Franchisees have cited to us no case supporting this proposition, and we have found none.

32. *Haverhill* demonstrates the procedural and proof problems in a bifurcated antitrust trial on liability and damages, see *infra,* but it, nevertheless, makes clear that "liability" includes fact of damage.

33. In *Wall I,* the district court limited the issues of the first phase of the non-jury trial "to alleged violations by defendants of Section 1 of the Sherman Act . . . and impact on the dealer plaintiffs." 326 F.Supp. at 296. In *Wall II,* the district court properly referred to phase I as the "trial on liability" wherein it had found a conspiracy to stabilize prices in the gypsum wallboard market which had a "'direct impact upon the plaintiffs, each of whom suffered damage to their respective businesses and properties in an as yet undetermined amount'." 357 F.Supp. at 835. Though "impact" was found in phase I, the district court stated that before it could make a just and reasonable estimate of damages, "plaintiffs must establish the existence of some causal connection between the defendants' unlawful acts and plaintiffs' injuries." *Id.* A causal link was required to prove "liability" in phase I even though that link was not strong enough to embrace all of the forms of injury claimed.

34. In our view, "impact," "fact of damage" and "causal link" mean the same things.

35. See Timberlake, "The Legal Injury Requirements and Proof of Damages in Treble Damage Actions under the Antitrust Laws," 30 Geo.Wash.L.Rev. 231 (1961); *Knutson v. Daily Review, Inc., supra,* 383 F.Supp. at 1376–88; and the many cases cited in the text and notes in *Terrell, supra,* 494 F.2d at 20.

reason that certain customers *within* Carolina's territory were not sold.

Carolina emphasizes Mummaw's testimony that Harris on two occasions told him not to worry about the 70 percent royalty "for now." But the fact is that there was never a "later." In short, Carolina had outside customers, it solicited outside customers, it never paid 70 percent and Leasco never asked for it.

Aubrey was the founder of the Datatron franchise in Louisville, Kentucky. Datatron had outside customers, Leasco knew this, and it never paid Leasco 70 percent of any revenues derived from extraterritorial sales.

Shortly after Datatron began its operations, in June, 1971, Leasco told it to go ahead and sell an outside prospect. In December, 1972, Datatron secured another outside customer. Leasco "waived" the 70 percent royalty with respect to this and three other potential outside customers in February, 1973.

Datatron argues that requiring a waiver shows the fact that they were damaged by the territorial restriction. We disagree. Datatron had already sold the outside account before its request to Leasco. Moreover, Datatron expected Leasco to waive the 70 percent requirement. There is no evidence that the discussion with Leasco caused a delay in the servicing of other accounts. Finally, there was no showing that Datatron had refused to service outside customers during the remainder of 1973, or, at least, until they stopped payment to Leasco in the summer of 1973.

[15] We are also unpersuaded that the consideration for the waiver (payments of amounts due Leasco for 1972 to the extent possible and of amounts currently due) was a showing of fact of damage. It was no more than money due under Datatron's contract with Leasco. In any event, Datatron did not remain current on its payments to Leasco. Nevertheless, Leasco did not seek the 70 percent royalty.

[16] Datatron also argues that fact of damage is shown because sales increased after the retention of counsel and it started selling outside of its territory. But this does not establish any loss as a result of the territorial restriction. There is no time specified for the alleged increases. There was no showing or attempt to show the reason for the increase. Cf. *Copper Liquid Inc. v. Adolph Coors Co., supra*, 506 F.2d at 954. This was particularly necessary where the alleged "restriction" had not been shown to limit outside sales previously. The fact that sales increased after Datatron began to sell outside has no bearing on fact of damage where it admitted that it began selling outside during the "restricted" period. We do not hold that events after a restriction is lifted by litigation may not be probative of fact of damage during the life of the restriction, but we recognize the close analysis which must be given to such evidence, cf. *Knutson v. Daily Review, Inc., supra*, 383 F.Supp. at 1381–84, and under these circumstances we hold that such a comparison—especially one of this general testimonial nature—is of little or no value.

Finally, it is of some moment that Datatron concentrated on developing the Louisville market because there was enough business or potential business there to keep its salesman busy. And, when Datatron defaulted on the DNC, Leasco did not claim a default with respect to the 70 percent royalty clause.

Friedman was Denver's founder and his testimony negates the existence of any injury to his franchise as a result of

a territorial restriction. He did not expect the unfavorable portions of the DNC to be enforced, and they were not. Denver made outside sales and did not pay the 70 percent royalty. Leasco did not claim a default with respect to the 70 percent royalty clause in the DNC. Finally, Friedman also testified that he did not actively seek outside customers because of time—not the 70 percent royalty.

Miami did not make any outside sales so the opportunity to charge the 70 percent royalty never arose. But Miami did solicit customers who were outside of its territory and there is no evidence that any customer was turned away as a result of the 70 percent clause.[36]

Wright, Miami's president, testified that the 70 percent clause was an inhibiting force in keeping Miami from going out of its territory. Such evidence would support a showing of a territorial restriction (as opposed to simply limitation). However, without more, cf. *Kestenbaum v. Falstaff Brewing Corp.*, 5 Cir. 1975, 514 F.2d 690, 697, it does not prove legal injury "as a matter of fact and with a fair degree of certainty" especially in view of Miami's evidence of outside solicitations and the untapped nature of the Miami market, the potential for which had not been exhausted. Cf. *Shumate & Co., Inc. v. National Association of Securities Dealers, Inc.*, 5 Cir. 1975, 509 F.2d 147, 153–55.

Recently in *Pitchford v. Pepi Inc., supra*, it was proven that defendants had an explicit territorial restriction that, if violated, would result in termination; plaintiff was denied three outside sales opportunities before the damage period because of the restriction; plaintiff was capable of making outside sales during the damage period; plaintiff unsuccessfully attempted to have his territory expanded over a period of several years and had plaintiff been permitted to compete in an expanded territory, it would have made additional sales.[37] Cf. *Reed Bros. v. Monsanto, supra.*

Here, there is no pre-damage period evidence of conduct. All franchisees made outside solicitations without reprisal and, in some cases, because of Leasco "leads." All but Miami had outside customers. None paid the 70 percent royalty on outside sales. While permission to sell outside could not legally have been required under *Schwinn*, it was received when requested by Datatron and Miami, the "conditions" of its receipt were not met by either, and the delay in receiving it produced no delay in service. No franchisee was terminated for other than legitimate reasons. Upon termination, no claim of default on any franchisee was made with respect to the 70 percent royalty clause. And there was insufficient evidence to show that the 70 percent royalty, rather than long distance phone charges or emphasis on development of local markets, materially contributed to reducing the number of outside sales that were made by Carolina, Datatron and Denver or prevented outside sales that would have been made by Miami.

36. A waiver was also given Miami but the customer involved was never serviced.

37. It was also shown that despite the extra transaction costs in relation to outside competitors, Pitchford would have made a profit on outside sales. This last point goes to computing the amount of damages on which the court remanded. In this respect, see *Perma Life Mufflers, Inc. v. International Parts Corp.*, 1968, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982; *Kestenbaum v. Falstaff Brewing Corp.*, 5 Cir. 1975, 514 F.2d 690, 695; Areeda, Antitrust Violations Without Damage Recoveries, 89 Harv.L.R. 1127, 1136–38 (1976).

We conclude, therefore, that the district court properly directed a verdict for Leasco on the issue of liability because each franchisee failed to submit sufficient evidence under *Boeing* to create a jury question on the existence of any injury caused by the territorial restriction.

Franchisees' contention of prejudice—that they were not able to show fact of damage because of the district court's bifurcation order—is more troubling.

Federal Rule of Civil Procedure 42(b) provides that a district court may order a separate trial of any issue "in furtherance of convenience or to avoid prejudice, when separate trials will be conducive to expedition and economy." We have approved such a bifurcation procedure on several occasions. However, we have cautioned that separation of issues is not the usual course that should be followed, *Swofford v. B & W Inc.*, 5 Cir. 1964, 336 F.2d 406, 415,[38] and the "the issue to be tried must be so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.*

[17, 18] Section 4 of the Clayton Act, 15 U.S.C.A. § 15, provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . ." As we have said, this section contemplates that not only must a violation be shown, but that the violation must result in or cause the legal injury alleged. "Liability" includes both violation and causation. But "damages" must be linked causally with "violation" before they are recoverable. This overlap is what prompted us to say in *Terrell* that "in a private antitrust suit there is no neat dividing line between the issues of liability and damages."[39] 494 F.2d at 21.

Because this "dividing line" is so difficult to draw, separate trials of "liability" and "damage" in antitrust cases[40] pursuant to Rule 42(b) must be approached with trepidation. The use of this trial procedure must be grounded upon a clear understanding between the court and counsel of the issue or issues involved in each phase and what proof will be required to pass from one phase to the next.[41] The trial court must be careful as well as flexible in its rulings on the admissibility of evidence under a bifurcation order. Simply because evidence contains numbers or amounts, for example, should not result in its exclusion in phase I. If causation or fact of damage cannot be shown without some reference to amount of damage, bifurcation should not prevent the reference.[42]

38. See Wright & Miller, Federal Practice and Procedure, § 2388; 5 Moore's Federal Practice, ¶ 42.03, p. 42–25.

39. See *Haverhill Gazette Co. v. Union Leader*, *supra*, 333 F.2d at 802: "In a private antitrust action liability and damages are not separate." Cf. Areeda, Antitrust Violations Without Damage Recoveries, supra, 89 Harv.L.R. at 1139: "an antitrust damage assessment cannot be divorced from thoughtful attention to the rationale for liability and the internal logic of the liability holding."

40. As an illustration of the juggling of violation, impact and damages which has occurred in the two phases of a bifurcated antitrust trial, see *Knutson v. Daily Review*, *supra*, 383 F.Supp. at 1354–55, bifurcated between "violation" and "impact and damages" and Wall Products I and II, *supra*, fn. 33.

41. See *In Re Master Key Litigation*, D.Conn. 1975, 70 F.R.D. 23, 20 F.R.Serv.2d, 619, 624, appeal dismissed, 2 Cir. 1975, 528 F.2d 5. Cf. *LoCicero v. Humble Oil & Refining Co.*, E.D. La.1971, 14 F.R.Serv.2d 1305.

42. For example, lost profits from outside sales is one injury claimed by those subjected to territorial restrictions. To show that profits *have been* lost, as opposed to *how much*, if

[19] While the franchisees now claim prejudice resulting from the separation of the issues of liability and damages in the trial below they failed to object to the district court's bifurcation order. We will not take note of error raised for the first time on appeal, F.R.Civ.P. 46; Wright & Miller, Federal Practice and Procedure, § 2472, p. 455, except "where the interest of substantial justice is at stake." *Edwards v. Sears, Roebuck and Co.*, 5 Cir. 1975, 512 F.2d 276, 286; see *Hormel v. Helvering*, 1941, 312 U.S. 552, 557, 61 S.Ct. 719, 85 L.Ed. 1037. For several reasons this is not such a case. Over three weeks intervened between the bifurcation of issues and the beginning of the trial. Franchisees had ample time to determine the boundaries of the bifurcation order, yet nothing was done.

[20] Moreover, it appears that the franchisees, contrary to their present claim, understood the extent of their burden. For example, in an "Order of Proofs First Two Days of Trial" franchisees asked the court to rule that "counsel make no reference to the court's bifurcation order" or "whether the jury will be required to return for further service or not dependent upon their verdict *on the issue of liability*" and "[t]hat the amounts (*as distinguished from the fact of*) *damage* not be mentioned in the presence of the jury, in either the Plaintiffs' case or the Defendant's counterclaim." (emphasis added).[43] In an "Order of Proofs Plaintiffs' Specification # 3" the district court was requested to admit certain deposition testimony on the ground that such excerpts "go the following issues":

. . . . .

5) Fact of damage.

. . . . .

8) Leasco's terminal maintenance-level-impact-effect-fact of damage.

. . . . .

10) The fact of customer losses.

In addition, it was stated that this proffered evidence "goes directly" to Leasco's argument of whether plaintiffs "suffered *any* actual damage by reason of defendant's alleged antitrust violations." There was reference to an exhibit which franchisees stated went to the issue of "fact of damage." There was a lengthy discussion of the element of "fact of damage" during the cross examination of Friedman, founder of the Denver franchise, midway through the plaintiffs' case. Counsel for Leasco sought to challenge Friedman's claim that Leasco's actions had cost him a loss in business value. Franchisees' counsel argued that the bifurcation order precluded this testimony. Counsel for Leasco responded:

> If they have not been damaged, they have no claim, Your Honor. . .
>
> . . . . . .
>
> They are entitled to adduce testimony on the fact of damage just as we are entitled to prove to the jury there was no fact of damage.

any, have been lost, would seem to require a showing (1) of the capability of making outside sales, and (2) of the sales that reasonably would have been made but for the restriction. See *Pitchford v. Pepi, Inc.*, *supra*, 531 F.2d at 105; *Kestenbaum v. Falstaff Brewing Corp.*, *supra*, 514 F.2d at 697. The fact that "numbers" may be used in (2) would not preclude admission.

43. This request which was granted weakens considerably franchisees' claim that the district court was unduly harsh in its evidentiary ruling with respect to the bifurcation order's boundaries, see *infra*.

In permitting cross examination the court noted that it was not in violation of the bifurcation order because "an essential element of the right of recovery is damage in both the fraud and antitrust claims." If franchisees were at all surprised by this statement no mention was made of it. If they then felt that it was incumbent upon them to submit proof that had not been offered they had over a month of trial time remaining to bolster their case.

In addition to the absence of an objection to the bifurcation order when it was first announced, franchisees' argument to the district court on the element of fact of damage in connection with Leasco's motion for a directed verdict was two-fold: there was a substantial basis in the record for a finding of fact of damage and fact of damage is not an element of liability under *Coors*. They did not argue that they had been prejudiced by the Court's rulings on admissibility of evidence.[44]

Finally, we conclude that the evidence excluded by the district court presumably because of the bifurcation order does not show any prejudice.

We now come to the tying claim raised by franchisees.

IV.

The franchisees assert that they were required to lease the Response I hardware configuration from Leasco as a condition to their purchase of a Leasco franchise, and that this requirement constituted a tie-in illegal under Sherman § 1. The district court found that the hardware and franchise constituted a single product, that there was no proof of coercion on the part of Leasco, and that there was no proof of economic power by Leasco in the time-sharing industry. A directed verdict was thus entered in favor of Leasco on this claim.

In order to comprehend the basis of the franchisees' claims, some understanding of a computer's operation is necessary. The time-sharing system described as Response I can be broken into three components: the computer hardware, the operating system (systems software) and the applications programs (application software). The computer hardware, the actual physical machinery, consists of discrete parts: a central processing unit, the electronic device which performs the basic logical and arithmetic operations; various devices for storing information, such as magnetic tape units, magnetic discs, and magnetic drums; and terminal devices, for the output and input of information. These parts, when physically interconnected, comprise a unique computer hardware configuration.

The physical devices, the hardware, are themselves capable of following only the most rudimentary logical and arithmetic instructions known as machine language. In order to enable the system to perform sophisticated tasks, these basic

44. There was reference to two evidentiary rulings. Counsel for franchisees stated that "we tried to prove time and again who the customers were that we lost and the reasons for the loss. The Court precluded that." In our review of the record, and in our consideration of the briefs and the oral argument, we have found no factual basis for this statement. It was also stated that proof of what happened after "we ignored the territorial provisions" was excluded. Such a comparison has no probative weight where the provisions had been ignored "during" their "existence." There was not even an oblique reference to the possible prejudicial effects of these rulings or any others in the context of bifurcation. Counsel stated that he brought them up "not to argue bifurcation" but to show how "some evidence was properly excluded which, if in the record, would support" a showing of damages.

operations must be combined. This is accomplished by the operating system, a complex computer program written in the basic machine language. In one aspect, the operating system is an interpreter, accepting instructions written in a more sophisticated language, and translating those instructions into the basic machine language instructions comprehendible by the computer hardware. In another aspect, the operating system acts as a controller, coordinating the activities of the various pieces of hardware with each other. Because of this latter task, the operating system is unique to the specific hardware configuration.

The final component of the computer system is the application software. These are computer programs designed to perform a specific function, generally usable by an individual without knowledge of the internal operations of the computer system. These programs are usually written in a sophisticated computer language, and then translated by the operating system into machine language instructions. In the case of Response I, the application software was designed to meet the general needs of small to medium sized businesses, performing such functions as inventory control, payroll, and the like.

The franchise agreement only provided the franchisee with the use of the Response I operating system and the Response I application software. The components necessary for the Response I system were detailed in the franchise agreement, but those components were not supplied under that agreement. The agreement stated that Leasco would lease the hardware to the franchisee upon terms set out in the agreement, but the agreement also made clear that the franchisee was free to procure the hardware from any other source.[45]

[21] Even though the franchisees were free under the terms of the franchise agreement to procure the computer hardware from any available source, each franchisee signed an equipment lease for the required equipment with Leasco. They contend that they were coerced by Leasco into signing this lease rather than procuring the equipment elsewhere. Their argument is two-fold. First, they assert that they could have procured the necessary hardware capabilities through a process known as multiplexing, and that Leasco arbitrarily refused to let them multiplex. Second, they assert that although the individual hardware components were available from sources other than Leasco, it would be technologically impossible for them to

45. The pertinent portion of the franchise agreements provides:

"4. *Response Equipment.* Leasco, in order to assist Owner and Operator in establishing its Response Service Business and to fully exploit the rights granted herein is willing to lease to them the items of equipment (hereinafter called the "Response Equipment") listed in Exhibit B attached hereto, and if they should accept Leasco's offer to lease such equipment, such lease shall be in accordance with the terms and conditions of the Lease Agreement attached hereto as Exhibit B. Leasco will arrange for the set up and installation of the Response Equipment in the Operator's premises without charge to Operator. All other equipment or items necessary to exploit the rights granted above shall be procured by the Operator at its own cost and expense including, but not limited to, tapes, discs, forms, data sets, terminal equipment, and telephone lines. Leasco may make such other equipment or items available for sale or lease to Operator from time to time under contract separate and distinct from this Agreement at mutually agreeable prices, (which shall not exceed Leasco's published retail prices, if any) but Operator shall be free to obtain such equipment or items, or their equivalent, from other sources.

configure or assemble the hardware so that it would function with the Leasco software. We find no evidence of coercion on the part of Leasco with respect to either claim, and thus affirm the directed verdict on the issue of tying.

[22, 23] A tying agreement is "an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product." *Northern Pacific Ry. v. United States*, 1958, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545. Such an agreement violates the Sherman Act whenever the party imposing the tie has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected. *Id.* at 6, 78 S.Ct. 514. As recognized by the Supreme Court, implicit in this formulation is the requirement that this requisite economic power actually be utilized to coerce the purchase of the tied product:

> The common core of the adjudicated unlawful tying arrangements is the *forced* purchase of a second distinct commodity with the desired purchase of a dominant "tying" product, resulting in economic harm to competition in the "tied" market. [emphasis added].

Times-Picayune Publishing Co. v. United States, 1953, 345 U.S. 594, 614, 73 S.Ct. 872, 883, 97 L.Ed. 1277. See also *Southern Concrete Co. v. United States Steel Corp.*, 5 Cir. 1976, 535 F.2d 313.

We thus agree with the Third Circuit that, in order to establish an illegal tie, it is not enough to show that the seller has sufficient economic power and that two products were purchased together. In addition, it must be shown that the purchaser was coerced into purchasing an unwanted product:

> We believe that coercion is implicit—both logically and linguistically—in the concept of leverage upon which the illegality of tying is premised: the seller with market power in one market uses that power as a "lever" to force acceptance of his product in another market. If the product in the second market would be accepted anyway, because of its own merit, then, of course, no leverage is involved; . . .

Ungar v. Dunkin' Donuts of America, Inc., 3 Cir. 1976, 531 F.2d 1211, 1218.

Our recognition of coercion as a necessary requirement in the proof of an illegal tie-in is in accord with similar holdings by other Courts of Appeal. *Ungar v. Dunkin' Donuts of America, Inc., supra; Capital Temporaries, Inc. of Hartford v. Olsten Corp.*, 2 Cir. 1974, 506 F.2d 658; *American Manufacturers Mutual Ins. Co. v. American Broadcasting-Paramount Mutual Theatres, Inc.*, 2 Cir. 1971, 446 F.2d 1131. Thus, in *Capital Temporaries*, the court found that although two services were sold as a package, there was no proof to suggest that the plaintiff ever objected to the package, that he was only interested in one of the two services, or that the second service was forced upon him. The absence of any evidence in this record mandated entry of summary judgment against the plaintiff. In *American Manufacturers*, plaintiff sued a TV network for allegedly forcing plaintiff to sponsor its product on both desirable and undesirable stations. The court found no illegal tie-in, noting:

> [Plaintiff] did not persevere long enough with its ideal [TV] lineup to feel any economic pressure from ABC, and we cannot know whether ABC would ever have tried to bring any such pressure to bear.

446 F.2d at 1137.

Of course, in certain circumstances, the element of coercion can be established on the basis of a formal agreement. Thus, where one product is sold on the express contractual condition that the purchaser purchase supplies for that product in the future only from the seller, the purchaser's future course of action is limited by that contract, and coercion is found in the agreement itself. *See, e. g., Advance Business Systems & Supply Co. v. SCM Corp.*, 4 Cir. 1969, 415 F.2d 55. But no such situation is before us. Here, the contractual arrangement left the franchisees free to procure the necessary hardware from any available source. Thus, in order to succeed on their claims, the franchisees must establish that their decision to lease the hardware from Leasco was not voluntary, but rather was coerced by Leasco.

The Response I system is an interactive time-sharing system. This means that users of the computer system, the customers of the franchisees, would not have to be located at the situs of the computer hardware in order to utilize its services. Rather, each customer would have its own computer terminal. In order to gain access to the computer, the customer would dial a telephone number assigned to a port, or input of the computer. The terminal would then be connected to the computer by use of the telephone line. Further, the operating system was designed so that it could process the input and output of more than one terminal simultaneously.[46] Under this system, the computer hardware would be located at the situs of the franchisee, and that hardware would have to be procured by him. The franchisees contend that they could have operated their Response I franchise without purchasing or leasing the required hardware by multiplexing into another Response I computer located elsewhere.

In a multiplexing scheme, the franchisee would not have his own hardware facility. Instead, the incoming telephone lines from the terminals would be input into a device known as a multiplexer, which would combine these lines into a single signal. This signal would then be sent out over a telephone line to a distant hardware facility, where it would then be broken down into the individual signals corresponding to each terminal, and processed by the computer hardware. Output from the computer to the terminals would be handled in the reverse manner. Under this scheme, the franchisees would only have to procure the multiplexing equipment, and access to another Response I computer system.[47] The franchisees argue that Leasco would not allow them to multiplex in order to sell Response I service through their franchisee. They say that the practical effect of this refusal was to force them to lease the hardware from Leasco, resulting in a tie between the hardware lease and the franchise.

With respect to this argument, the coercion requirement demands that they establish that their failure to procure multiplexing was not voluntary on their part, but rather that the decision not to

46. The Response I system as initially designed had ports for 16 terminals, and thus could process sixteen customers at the same time.

47. In this regard, paragraph 10(e) of the franchise agreement provided the franchisees could purchase Response I computer time from Leasco at 70 percent of Leasco's standard rental rates, provided that other costs for telephone lines, multiplexers, data set and terminals would be borne by the franchisee.

multiplex was forced upon them by Leasco. Our careful review of the evidence bearing on this multiplexing claim establishes that the franchisees were never precluded from multiplexing by Leasco. At most, the evidence establishes that the decision was brought about by the persuasive selling techniques of Leasco, with that persuasion falling far short of coercion.

Although the trial of plaintiff's case took four months and covers 6000 pages of transcript, the testimony relating to the multiplexing claim is so scanty that we set it out in full. Mummaw, a principal of the Carolina franchise, asked Harris, a Leasco Response officer, whether it could multiplex until it had enough revenue to justify the use of an in-house computer. Mummaw testified that Harris' response was:

> "You are going to expand and grow so fast you might as well install the equipment now."

The testimony of Wright, principal of the Miami franchise, is no stronger: Wright asked Shrager, a Leasco principal, whether he could multiplex. As stated by Wright,

> He [Shrager] told me we were going to be so successful that we would not need to multiplex in the Miami area. He said we would be better off with the Response I computer there.

The testimony of Aubrey, principal of Datatron, though perhaps somewhat stronger, is in substance no different. It is testimony of persuasion, not coercion:

> Q: Did you ever ask for permission to multiplex through one of their centers that was closer by?
>
> A: [Aubrey] Yes, when we first went in business, I asked Mr. Harris if I could multiplex into a Response I computer that would be closely located to Louisville . . . and he explained to me that the concept of the data network centers was to have a local company and that this would not be permissible and he said this is really for your benefit—it is to the advantage of your company not to do that, and so we did not.

Finally, plaintiffs concede that there was never any discussion of multiplexing with regard to the Denver franchise.

Although, in some instances, the line between coercion and persuasion might not be clear, in which circumstance the issue should be left for the finder of fact to resolve, the evidence before us does not provide such an instance. We conclude that, under the standard of *Boeing, supra,* there is no substantial evidence that any of the franchisees were prohibited from utilizing multiplexing through the coercive acts of Leasco.

Next, the franchisees claim that the two products involved, the franchise and the hardware, were coercively tied through the technology involved—since the systems software, the operating system, was only compatible with the hardware configuration designed by Leasco, the franchisees necessarily had to purchase the hardware along with the software. We fail to find any evidentiary support for this contention.

First, there is no evidence in the record that the individual components of the hardware configuration could not have been purchased from sources other than Leasco, and that when so purchased, they could not have been assembled into the same hardware configuration leased by Leasco.[48] The franchisees seem to assert that this avenue was not open to them. They argue that even if they did assemble the components into the required hardware configuration, they could not operate the system because Leasco withheld from them the Response I operating system. This is completely without evidentiary support. Not only does the franchise agreement provide that Leasco must furnish the operating software,[49] but there is no evidence at all that they failed to comply with this provision, or would not have complied with it had the franchisees not leased the hardware from Leasco.

Second, the franchisees did not obtain the computer hardware elsewhere not because it was impossible to do so, but rather, in their business judgment, it made more sense to procure it from Leasco. For example, Aubrey, principal of Datatron, testified that he could have purchased the hardware from Hewlett-Packard, manufacturer of some of the components, but he did not do so because, in his judgment, "it would not have made good business sense." We find no evidence contrary to this assertion.

These two points lead us to the conclusion that, as with the multiplexing claim, there is no proof that the franchisees were coerced into accepting the hardware lease along with the franchise. We can find no proof that any of the franchisees desired to purchase or lease the hardware from someone other than Leasco, or conversely, that any of them ever envisioned the purchase of the franchise without the lease of the hardware. As far as we can discern, the decision of the franchisees to sign the hardware lease was completely voluntary on their part, motivated by business reasons, not by coercion on the part of Leasco.

[24] Even if we accept the argument of the franchisees that they could not obtain the hardware from others because duplication of the configuration was dependent upon knowledge of unique proprietary information available only from Leasco,[50] an argument which we find without evidentiary support, we still find no illegal tie-in. In some instances, two products might be illegally tied through the technological relationship between them. If, for example, the systems software was designed to only be compatible with a specific hardware configuration, and that specific hardware configuration, because it is based on information held only by the seller, is only available from that seller, then a violation might be found. But such a violation must be limited to those instances where the technological factor tying the hardware

48. Of course, a different situation might be presented if Leasco refused to provide the technical information necessary to assemble the components into the required configuration. But there is no evidence in the record that such information was ever requested, or, if requested, would have been refused by Leasco.

49. The franchise agreements provide that Leasco shall furnish the franchisee with Response Service, which includes those computer programs comprising the applications packages and the Response I Basic Computer System Software. See fn. 2, *supra.*

50. If the hardware configuration was so complex that the franchisees could not duplicate it even if they had all necessary proprietary information, a position which they vaguely assert, we still fail to see any Sherman § 1 violation. In order for a tie to exist, the seller must be using its economic power in the tying product to "restrain free competition in the market for the tied product," *Northern Pacific Ry. Co. v. United States,* 1958, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545. But if it was not possible to duplicate the hardware system, then there was no actual or potential competition to Leasco with respect to that hardware which is restrained by the alleged tie. *See Coniglio v. Highwood Services, Inc.,* 2 Cir. 1974, 495 F.2d 1286.

to the software has been designed for the purpose of tying the products, rather than to achieve some technologically beneficial result. Any other conclusion would enmesh the courts in a technical inquiry into the justifiability of product innovations. *See Telex v. International Business Machines Corp.*, N.D.Okla.1973, 367 F.Supp. 258, 347, reversed on other grounds, 10 Cir. 1975, 510 F.2d 894. Here, not only is there no proof that the hardware configuration was only available from the seller because of proprietary information withheld by him,[51] but in addition there is no evidence that the interrelationship of the software system to the hardware was for the purpose of illegally tying the two.

The basic hardware, as purchased from Hewlett-Packard by Leasco, was inadequate, mainly in memory capacity, to support a time-sharing environment. Changes were made, both in hardware, through the interface of the Control Data disks and other devices to the central processing unit for additional memory capacity, and in software, through the refinement of the original Hewlett-Packard operating system. Such changes were integrally related and necessary for the development of the complete Response I system. There is no evidence that they were made for the purpose of tying the hardware to the software.[52]

Since we find no evidence of coercion on the part of Leasco, either with regard to the multiplexing claim or the hardware claim of the franchisees, we find it unnecessary to reach the other grounds set out by the district court as the basis for the directed verdict on this issue.

In summary, we hold:

1. Under *Schwinn*, the district court erred in directing a verdict for Leasco on the existence of an illegal vertical restraint.

2. However, the district court properly held that franchisees failed to introduce sufficient evidence that they were injured as a result of the alleged restraint. Therefore, the district court's judgment on the territorial restriction claim is affirmed.

3. The district court properly held that the franchisees failed to introduce sufficient evidence to establish that their decision either not to multiplex or to purchase computer hardware from Leasco was coerced by Leasco. Therefore, the directed verdict on the tying claim was proper.

AFFIRMED.

51. See footnote 48, *supra*.

52. The franchisees point to evidence which establishes that part of Leasco's intent in setting up the franchise operation was to find an outlet for excess hardware which it owned. However, the relationship between the hardware and software in the Response I system was established at least one year before the first franchise was sold, with the Response I system first being utilized by Leasco-owned branches. There is no evidence that the technological relationship between the hardware and software systems was created for other than technological benefits. The intent of Leasco with regard to the franchise operations does not bear on this point.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1636

DAVID UNGAR, et al. and JOHN RADER, et al.,
Petitioners,

v.

DUNKIN' DONUTS OF AMERICA, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS IN OPPOSITION

Petitioners' reply brief is devoted to discussion of the recent decision of the Second Circuit in *Hill* v. *A-T-O, Inc.,* 1976-1 Trade Cas. ¶ 60,873 (2d Cir. May 10, 1976). Petitioners argue that "the present case is identical to the *Hill* case" (Reply Br. at 2) and that

the ruling in *Hill* is "in direct conflict" with the decision below (*id.* at 1).

Petitioners' assertions are incorrect. The instant case is fundamentally different from *Hill* and there is no conflict whatever between them.

Hill involved "an *admitted tie* between two clearly separate products . . . . It is *undisputed* that the only way that membership in the . . . buying service could be obtained . . . was through purchase of the . . . vacuum cleaner" (1976-1 Trade Cas. ¶ 60,873 at 68,824; Reply Br., Exh. 1 at 18; emphasis supplied). Since there was no dispute that tying (*i.e.,* sales on condition) had taken place, proof of "actual coercion" was superfluous in *Hill*. Accordingly, the court of appeals reversed the district court, which had ruled that, even though tying was admitted, plaintiffs were required to prove "actual coercion" as an additional element of the tying offense.

In the present case, by contrast, the existence of a tie is vigorously disputed and the central issue is the nature of proof necessary to establish that tying occurred.[1] The district court below ruled that proof of a "*policy to persuade* the franchisees to accept the allegedly tied items" was adequate to establish tying (A. 180; *see also* A. 81-82, 100-03, emphasis supplied). The court adopted this standard because of its belief that "there can indeed be a 'voluntary,' yet illegal tie" (A. 79). The court of appeals held this ruling was erroneous: proof of a "policy to persuade" cannot establish the existence of a tie because it does

[1] Unlike the present case, there was no issue on appeal in *Hill* regarding the propriety of the class certification (1976-1 Trade Cas. ¶ 60,873 at 68,822 n.1, Reply Br., Exh. 1 at 13 n.1).

not demonstrate that the seller *requires* purchasers to take the allegedly tied item as a condition of obtaining the tying item (A. 191-93).[2]

The decisions of this Court and the lower federal courts—including the decisions of the court of appeals below and the Second Circuit in *Hill*—have consistently rejected the notion that there can be a voluntary, yet illegal, tie. *E.g., Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1, 6 n.4 (1958). When the existence of tying is disputed, as it is in this case, the plaintiff must show "actual coercion," *i.e.,* "that he was the unwilling purchaser of the tied product." *Capital Temporaries, Inc.* v. *The Olsten Corp.,* 506 F.2d 658, 661, 663 (2d Cir. 1974). Thus, petitioners were obligated to show not merely a policy to persuade, or that many franchisees purchased or leased the allegedly tied items, but also that the purchase of those items was coerced rather than voluntary. Since it was conceded by the district court that such proof raises predominantly individual issues (A. 131), the court of appeals correctly reversed the class action certification.

There is plainly no conflict between *Hill* and the decision below. The two cases are so different on their facts that it is not surprising that the Second Circuit

[2] A "policy to persuade" is thus different from the "unremitting policy of tie-in" which was admitted in *Hill* (1976-1 Trade Cas. ¶ 60,873 at 68,825; Reply Br., Exh. 1 at 22) or a "policy to condition" (Reply Br. at 2). Similarly, the alternate proof held sufficient by the district court and rejected by the court of appeals—that a large number of franchisees in fact bought the allegedly tied items—does not entail a showing that the seller requires purchasers to take the allegedly tied item. *See* Resp. Opp. at 6.

in *Hill* did not even cite the decision of the court of appeals in the instant case.[3] Yet, both decisions recognize and apply established principles regarding the proof necessary to demonstrate an illegal tie-in. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[3] In another recent decision, *Hehir* v. *Shell Oil Co.,* 1976-1 Trade Cas. ¶ 60,928 (D. Mass., No. 75-855-M, June 1, 1976), the court relied explicitly on the decision of the court of appeals in the instant case in declining to certify a class action in a tying case because of the necessity of proof of individual coercion.

IN THE

Supreme Court of the United States

October Term, 1975

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and

JOHN RADER, et al.,

Petitioners,

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DUNKIN' DONUTS OF AMERICA, INC., et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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TABLE OF CITATIONS.

I. The Decision of the Third Circuit Court of Appeals in the Instant Case Is in Direct Conflict With the Decision of the Second Circuit Court of Appeals in *Hill v. A-T-O, Inc.*, on the Issue of Whether "Actual Coercion" Is a Separate and Distinct Element Which a Plaintiff Must Affirmatively Prove in Order to Establish an Illegal Tie-in.

Since the filing of the Petition For Certiorari in this case, the Second Circuit Court of Appeals has handed down a decision which is in direct conflict with the decision of the Third Circuit Court of Appeals in the case *sub judice*, on the issue on which certiorari is sought.

In *Hill, et al. v. A-T-O, Inc., et al.*, 1976–1 Trade Cases ¶ 60,873 (2d Cir. May 10, 1976) (a copy of the Slip Opinion is attached hereto as Exhibit "1"), in which class action status had been granted by the District Court on the tie-in issue, the plaintiffs appealed from the grant of summary judgment in favor of the defendants. One of the claims on which summary judgment was granted in favor of the defendants was that the defendants tied the sale of membership in an organization called Family Buying Power, Inc. to the purchase of vacuum cleaners manufactured and sold by various defendants. The District Court, relying on *Capital Temporaries, Inc. v. Alston Corp.*, 506 F. 2d 658 (2d Cir. 1974), held that summary judgment for the defendants was proper since there was no evidence introduced by plaintiffs that would establish "actual coercion" on behalf of the defendants with respect to the alleged tie-in. On appeal the Second Circuit Court of Appeals reversed this holding of the District Court, stating, *inter alia:*

> We believe the district court misconstrued our decision in *Capital Temporaries* and therefore reverse its grant of summary judgment and remand for trial on the merits of the first cause of action asserting an

> illegal tying arrangement by defendants. [Exhibit "1", p.15]
>
> * * *
>
> The district court held that its grant of summary judgment dismissing plaintiff's claim of illegal tie-in was compelled by this Court's decision in *Capital Temporaries, Inc. of Hartford v. Olsten Corp.*, 506 F. 2d 658 (2d Cir. 1974) because plaintiffs had failed to make any assertions which if proved would establish "actual coercion" on behalf of the defendants in the sale of the tied product. We disagree. [Exhibit "1", p. 20]
>
> * * *
>
> An unremitting policy of tie-in, if accompanied by sufficient market power in the tying product to appreciably restrain competition in the market for the tied product constitutes the requisite coercion under *Capital Temporaries,* given foreclosure of a not insubstantial volume of interstate commerce. See, e.g., *Fortner v. United States Steel Corp., supra; Northern Pacific Railway Co. v. United States, supra.* [Exhibit "1", p. 22]

The present case is identical to the *Hill* case. Plaintiffs-petitioners had always urged as the basis of liability that defendants had a firm and resolutely enforced company-wide policy to use its economic power to condition the sale of its franchise on the agreement by the prospective franchisee to purchase and/or lease other products from the defendants or their designated suppliers. This position was clearly recognized by the Circuit Court of Appeals for the Third Circuit which stated, *inter alia:*

> Summarized, it was appellees' [petitioners'] contention that Dunkin' Donuts [respondents] had a policy of granting a license to use its trade mark only on the condition that the licensee accept certain other items from Dunkin' Donuts, and that this practice constituted a tying arrangement illegal under the antitrust laws. (A 185).
>
> * * *
>
> And appellees emphasized that the focus of their case was not individual instances of illegal conduct, but a pervasive company policy, "firm and resolutely enforced" to tie the real estate, equipment and supplies to the trade mark license. (A 187).

The District Court, after sifting through voluminous evidence, noted that there was sufficient evidence to establish a *prima facie* case of such a company tie-in policy. However, on appeal the Court of Appeals reversed on the grounds that such evidence would not be sufficient evidence of actual coercion. This decision of the Third Circuit Court of Appeals is directly and diametrically opposed to the decision of the Second Circuit Court of Appeals in the *Hill* case.

Moreover, the Second Circuit's decision in the *Hill* case completely supports petitioners' analysis and reading of the tie-in cases of this Court (See pp. 11-20 of Petition for Certiorari). In its Petition For Certiorari, as in its brief to the Third Circuit Court of Appeals, petitioners stated at p. 20, *inter alia:*

> Moreover, whatever "coercion" may be necessary, if any, is automatically and necessarily present when the standard elements are present.
>
> * * *
>
> * * * These elements—conditioning, use of economic power, and impact on interstate commerce—are broad enough to subsume "coercion" no matter how defined or subtly wielded.

The language of the Second Circuit in the *Hill* case, quoted above, is remarkably similar. Thus, the Second Circuit agrees that proof of the standard elements of a tie-in, i.e. use of economic power, tie-in condition and impact on interstate commerce, establishes an illegal tie-in. The Court of Appeals in the case *sub judice*, however, has held erroneously that proof of these elements is not sufficient, but, in addition, a plaintiff must *also* prove the separate and distinct element of "actual coercion."

As in the *Hill* case, the petitioners herein alleged, and sought the opportunity at trial to prove, that there was a firm and resolutely enforced company-wide policy of tie-ins. While the case was before the District Court on a class action certification petition, petitioners produced substantial evidence which showed,[1] *inter alia:*

1. Prior to November 1, 1970 there was an express tie-in condition in Dunkin' Donuts standard form contracts (A 100).

2. There was testimonial and other documentary evidence that this tie-in condition was the policy of the company (A 100-102).

3. While the tie-in language was taken out of the standard form contracts as of November 1, 1970, the actual policy of the company never changed concerning the tie-in condition (A 102-103).

4. Despite the uneconomic nature of purchasing the equipment from the defendants, virtually 100% of the franchisees, both before and after November 1, 1970 purchased the equipment package from the defendants (A 103).[2]

1. The issue of whether or not there is a separate and distinct element termed "actual corecion" is important to the class action determination in this case since the District Court determined that all of the standard elements of a tie-in could be proven on a class basis, but that the element of "coercion" or "individual coercion" as defined by the defendants could not be proved on a class basis.

A conflict of the Circuit Courts of Appeals exists on an important issue of antitrust law. This conflict concerns the very elements necessary to prove an illegal tie-in. That law should be uniform throughout the country and thus this Court should grant certiorari to resolve that conflict. Petitioners therefore request that certiorari be granted to resolve the conflict between the Second and Third Circuit Courts of Appeals on the question of whether a plaintiff, in order to establish an illegal tie-in, must prove, in addition to the recognized elements of a tie-in, a separate and distinct element of "actual coercion."[3]

II. The Court of Appeals Holding That a Franchisee "Must Prove That His Purchases Were *Coerced* as an *Element* of Establishing a Prima Facie Case of Illegal Tying"[4] Introduces a New and Additional Element to the Traditional Tie-in Elements.

After urging the "individual coercion doctrine" on the District Court, and having its position accepted by the Court of Appeals, the defendants-respondents are now en-

2. Contrary to the contention in respondents brief (P. 6 fn. 3), the District Court did, in fact, make a finding that plaintiffs produced *prima facie* evidence that it was uneconomic for a franchisee to purchase the products directly from defendants or its suppliers rather than purchasing them in the competitive market (A 102-103). This evidence allows the inference that the defendants used its economic power to bring about this anticompetitive result (A 81-82).

3. As set out in detail in the original Petition, the decision of the Court of Appeals in the instant case is also contrary to the tie-in decisions of this Court and results in a complete emasculation of the purpose behind Rule 23 of the Federal Rules of Civil Procedure.

4. A 209, emphasis added.

gaged in a headlong retreat from that doctrine. In the lower Courts, defendants argued that plaintiffs must prove "coercion" as a separate and independent element of a tie-in and the Court of Appeals accepted this argument. Plaintiffs, on the other hand, contended that "coercion" was not a separate and independent element of a tie-in and all that a plaintiff must prove was the recognized and standard elements of a tie-in: use of economic power, condition and requisite impact on interstate commerce. Defendants' current position with this Court is that "coercion" is, in all cases, synonymous with conditioning. However, even if defendants' latest position were valid, then, *a fortiori,* the District Court was correct in granting the class since plaintiffs alleged and provided *prima facie* evidence of a firm and resolutely enforced company policy to use its economic power to impose a tie-in condition (A 100-103). Therefore, the Court of Appeals decision was incorrect and should not be allowed to remain as precedent. The defendants-respondents' current contentions serve only to confound the confusion already engendered by the decision of the Court of Appeals in the instant case.

Moreover, the plaintiffs have always recognized their burden of establishing a tie-in condition. Indeed, the Court of Appeals recognized this when it stated that it was plaintiffs' contention that "Dunkin' Donuts had a policy of granting a license to use its trade-mark only *on the condition* that the licensees accept certain other items from Dunkin' Donuts, . . ." (A 185) (emphasis added). Also, as indicated on page 7 of the Petition for Writ of Certiorari, the District Court always recognized that "a tie-in cannot exist unless the availability of the tying product *is conditioned* on the purchase of the tied product" (A 45) and that "the plaintiff must prove that the tying product was unavailable *without the tied product*" (A 45

fn. 31) (emphasis added). Thus, the issue before the District Court and before the Court of Appeals was not whether plaintiffs had the burden of proving a tie-condition; that burden was acknowledged. The issue was whether, as the Court of Appeals stated:

> . . . [plaintiff] *must prove* that his purchases were *coerced as an element* of establishing a prima facie case of illegal tying (A209) (emphasis added).

Contrary to the District Court in the case at bar and the Court of Appeals in *Hill,* the Court of Appeals in the case *sub judice* failed to recognize that "coercion", as such is not an independent element of tie-in law, but that "coercion" is but one mode of proof in establishing the use of economic power to condition. The District Court also recognized, based upon prior decisions of this Court, that there were alternative modes of proof that would establish the use of economic power e.g., a burdensome tying arrangement (See pp. 21-22 of Petition For Certiorari). The District Court did not reject the requirement of a tie-in condition; it rejected defendants' contention that plaintiffs must also prove the separate and distinct element of "individual coercion." However, the Third Circuit Court of Appeals reversed the District Court and ruled that each plaintiff must, in fact, prove coercion ". . . as an element . . ." in proving an illegal tie-in. It is the correctness of that holding which is the subject of the instant petition.[5]

5. While respondents' Brief in Opposition to the Petition for Certiorari states that: "Petitioners greatly exaggerate both the effect of the Court of Appeals decision and the proper role of class actions in enforcing the antitrust laws." (P. 13), counsel for respondents, in prepared testimony before the United States Senate Committee on Commerce which was holding hearings on April 8, 1976 on the "Fairness in Franchising Act" S. 2335, described the Court of Appeals decision as being "landmark" in scope.

There is no dispute about the traditional elements of a tie-in, i.e., use of economic power, tie-in condition and requisite impact on interstate commerce. Based upon this Court's decisions, the plaintiffs and the District Court have always recognized these elements and the District Court ruled that they could be established on a class basis. Thus, the question before this Court does not concern a tie-in condition. There is no question that plaintiffs have alleged and, although the case is not in the posture for trial on the merits, have submitted substantial proof of the existence of a company-wide policy to use its economic power as a condition in obtaining the franchise. The question involved is whether the traditional elements are enough or whether a plaintiff has the additional burden of proving a separate and distinct element called "individual coercion." As discussed in the Petition for Writ of Certiorari filed heretofore and in the previous section dealing with the *Hill* case, to impose such an additional element is contrary to the cases and contrary to sound antitrust policy.

For the reasons set forth in this Reply Brief and the Petition for Writ of Certiorari, petitioners respectfully request that this Court grant this petition and issue a Writ of Certiorari to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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EXHIBIT "1"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 232—September Term, 1975.

(Argued December 18, 1975 Decided May 10, 1976.)

Docket No. 75-7295

CHERYL PERRY HILL, THELMA LINDO, VICTORIA RAPHAEL, LURLINE RUTHERFORD, and ANSONIA LEWIS, for themselves and all persons similarly situated,

Plaintiffs-Appellants,

v.

A-T-O, INC., FAMILY BUYING POWER, INC., NATIONWIDE PROMOTIONS, INC., EXECUTIVE BUYING POWER, INC., COMPACT ASSOCIATES, INC., COMPACT BELLEROSE, INC., COMPACT ELECTRA CORP., HYMAN SINDELMAN a/k/a HY DELMAN, M. ROBERT DORTCH and FRANK DORTCH,

Defendants-Appellees.

Before:

HAYS, TIMBERS and GURFEIN,

Circuit Judges.

Appeal from two orders of the United States District Court for the Eastern District of New York, Walter

Bruchhausen, *Judge*, which on reargument granted defendants' motion for summary judgment dismissing the amended antitrust complaint and denied plaintiffs' motion for leave to amend the complaint.

Reversed.

JANET BENSHOOF, New York, N. Y. (Brooklyn Legal Services Corp. B., New York, N. Y., on the brief, John C. Gray, Jr., Douglas V. Ackerman, of counsel), *for Appellants.*

LEWIS HARRIS, New York, N. Y. (Harris, Fredericks & Korobkin, New York, N. Y., on the brief, Barry I. Fredericks, of counsel), *for Appellee A-T-O, Inc.*

BARTON P. BLUMBERG, New York, N. Y. (DiFalco, Field & Lomenzo, New York, N. Y., on the brief, Joel L. Cohen, of counsel), *for Appellees Family Buying Power, Inc., Nationwide Promotions, Inc., Executive Buying Power, Inc., Family Cleaning Power, Inc., M. Robert Dortch and Frank Dortch.*

IRWIN M. BERG, New York, N. Y. (Norman S. Langer, New York, N. Y., on the brief), *for Appellees Compact Associates, Inc., Compact Bellerose, Inc., Compact Electra Corp., and Hyman Sindelman.*

HAYS, *Circuit Judge:*

Plaintiffs appeal from two orders of the United States District Court for the Eastern District of New York. The first order, dated March 5, 1975, granted defendants leave to reargue a motion for summary judgment and upon

reargument awarded summary judgment dismissing the amended complaint. The second order, dated April 11, 1975, denied plaintiffs' motion for leave to reargue or reamend their amended complaint and General Rule 9(g) statement.

Plaintiffs' class action [1] was commenced in the district court on December 3, 1973 and alleges violations by defendants of the federal antitrust laws. Defendant A-T-O, Inc. ("ATO") manufactures vacuum cleaners and certain vacuum accessories for residential use and sells them in interstate commerce to independent distributors for retail sale. The defendants Family Buying Power, Inc., Nationwide Promotions, Inc., Executive Buying Power, Inc., Family Cleaning Power, Inc., M. Robert Dortch and Frank Dortch (the "FBP defendants") own and operate a quotation and buying service (the "buying service") through which members who pay an annual membership fee obtain a catalogue and quotation sheets which allegedly enables them to purchase various types of merchandise at large discounts. Compact Associates, Inc., Compact Electra Corp., Compact Bellerose, Inc., and Hyman Sindelman (the "Compact defendants") are retail distributors which marketed the ATO vacuum cleaners together with membership in the buying service in the New York City area by means of door-to-door solicitations during certain times alleged in the amended complaint. Plaintiff class consists of purchasers of the vacuum cleaner and membership in the buying service sold to them by the

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1. The district court certified the Plaintiff Class in its Memorandum and Order dated January 21, 1975, as being comprised of "all persons who purchased or received a buying service, operated by the Family Buying Power, Inc., defendants together with a vacuum cleaner manufactured by ATO from the Compact defendants during [the relevant time period]." The appropriateness of this certification order was not appealed by the defendants and is not presently before this Court.

Compact defendants pursuant to written agreements executed during the course of the in-home solicitations.

In the winter of 1967 ATO purchased directly from the FBP defendants membership certificates in the FBP buying service which ATO in turn sold with its vacuum cleaners to the Compact defendants for retail sales. About a year later ATO and FBP terminated their business relationship after the Federal Trade Commission had questioned the propriety of the use of the FBP buying service membership certificates in connection with the sales of the vacuum cleaners. Subsequent to this development the Compact defendants obtained the FBP certificates directly from the FBP defendants and continued to sell them to the ultimate consumers together with the ATO manufactured vacuum cleaners. At all relevant times Compact had an exclusive license to offer FBP certificates in the New York metropolitan region. It did so only in conjunction with sales of the vacuum cleaners. Prospective customers were told by Compact salesman that if they agreed to purchase the cleaner they would be given "free of charge" a membership certificate in the FBP buying service. The Compact defendants admit that they never sold memberships in FBP separately from sales of the vacuum cleaner.

This action was brought under Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15 and 26, for violation of Section 1 of the Sherman Act, 15 U. S. C. § 1. Plaintiffs' amended complaint set forth two causes of action. First, it is alleged that defendants have agreed to use and have imposed an illegal tying arrangement in the sale of the vacuum cleaners and buying service memberships, the effect of which is unreasonably to restrain interstate trade and commerce in the market for home vacuum cleaners. Second, plaintiffs alleged that defendants conspired to use a selling program consisting of misrepresentation and fraud, and have used such a program for the purpose of restraining interstate commerce in the market for home vacuum cleaners and/or buying service memberships. Plaintiffs seek injunctive relief and treble damages.

On January 21, 1975, the district court denied defendants' motion for summary judgment holding that there were genuine and material issues of fact which could only be resolved at trial. On March 5, 1975, the district court granted the defendants leave to reargue the motion for summary judgment and upon reconsideration reversed its earlier decision of January 21 and awarded summary judgment pursuant to Rule 56, Fed. R. Civ. P. dismissing plaintiffs' amended complaint. In its Memorandum and Order of March 5, 1975, the district court stated that its grant of summary judgment against plaintiffs' first cause of action alleging an illegal tying arrangement was based upon application of this Court's decision in *Capital Temporaries Inc. of Hartford v. Olsten Corp.*, 506 F. 2d 658 (2d Cir. 1974). The Court held that neither the amended complaint nor any supporting affidavit or other evidence introduced by plaintiffs had established "actual coercion" on behalf of the defendants with respect to the alleged tie-in. The second cause of action was dismissed on the grounds that it was, in essence, a claim for common law fraud not within the scope of the Sherman Act. We believe the district court misconstrued our decision in *Capital Temporaries* and therefore reverse its grant of summary judgment and remand for trial on the merits of the first cause of action asserting an illegal tying arrangement by defendants.

I.

The standards under which a tying arrangement conditioning the sale of one product upon the purchase of

another is deemed to be a *per se* violation of the federal antitrust statues are well established. *Northern Pacific R. Co. v. United States,* 356 U. S. 1, 5-6 (1958) sets forth the two controlling standards.

> "For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product. . . . Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed 'tying agreements serve hardly any purpose beyond the suppression of competition.' *Standard Oil Co. of California v. United States,* 337 U. S. 293, 305-306. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons 'tying agreements fare harshly under the laws forbidding restraints of trade.' *Times-Picayune Publishing Co. v. United States,* 345 U. S. 594, 606. *They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected. International Salt Co. v. United States,* 332 U. S. 392." (footnote omitted) (emphasis supplied).

The Supreme Court's most recent tie-in decision in *Fortner Enterprises, Inc. v. United States Steel Corp.,* 394 U. S. 495 (1969) elaborated these two *per se* require-

ments in the context, as here, of a motion for summary judgment. The complaint in *Fortner* charged that in order to obtain certain real estate development loans petitioner had been required to agree to purchase and erect respondent's prefabricated houses. The Court reversed a grant of summary judgment against the petitioner. With respect to the requirement that the defendant exert economic power in the tying product market sufficient to restrain competition in the market for the tied product, the Court held that petitioner's pleadings and affidavits which tended to show that competitors of United States Steel sold comparable prefabricated houses at lower prices and that petitioner had accepted the tying condition "solely because [respondents'] offer to provide 100% financing, lending an amount equal to the full purchase price of the land to be acquired, was unusually and uniquely advantageous to him", 394 U. S. at 504, entitled petitioner to go to trial on this issue.[2]

> "The standard of 'sufficient economic power' does not, as the District Court held, require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market. . . . As

2. With respect to the second requirement that a not "insubstantial" amount of commerce in the tied product be involved, *International Salt Co., Inc. v. United States,* 332 U. S. 392, 396 (1947), the *Fortner* Court made clear that all this requires is that the volume of business foreclosed by the tying arrangement not be merely "*de minimis.*" 394 U. S. at 501. In the present case defendants do not and could not successfully contend that this *de minimis* requirement has not been met since Plaintiff Class is comprised of over 10,000 purchasers of the Compact vacuum cleaner.

we said in the *Loew's* case, 371 U. S. at 45: 'Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes'." 394 U. S. at 502-03.

In the present case appellants have made a showing sufficient to entitle them to attempt to prove their allegations of illegal tie-in at trial. *Fortner v. United States Steel Corp., supra. See, Northern Pacific Railway Co. v. United States, supra; Viacom International, Inc. v. Tandem Productions, Inc.*, 526 F. 2d 593, 597 (2d Cir. 1975); *Coniglio v. Highwood Services, Inc.*, 495 F. 2d 1286, 1290-91 (2d Cir.), *cert. denied*, 419 U. S. 1022 (1974). *Cf. United States v. Loew's Inc.*, 371 U. S. 38 (1962); *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 156-59 (1948); *International Salt Co., Inc. v. United States*, 332 U. S. 392 (1947). There is an admitted tie between two clearly separate products.[3] *Compare Times-Picayune Publishing Co. v. United States*, 345 U. S. 594, 613-14 (1953). It is undisputed that the only way that membership in the FBP buying service could be obtained in the New York metropolitan region was through purchase of the Compact vacuum cleaner. The Compact defendants hold the exclusive franchise to sell membership certificates in this area and admit that they did so only in conjunction with vacuum cleaner sales. Although defendants contend that membership in the buying service was "free", used solely as a "promotional gimmick" in the sale of vacuum cleaners, we believe this point irrelevant for purposes of tie-in analysis. To hold to the contrary would permit escape from the

3. Since the FBP buying service is not a "commodity" within the meaning of section 3 of the Clayton Act that provision is inapplicable. *See, e.g., Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F. 2d 55, 64 (4th Cir. 1969), *cert. denied*, 397 U. S. 920 (1970).

antitrust proscription against illegal tie-ins by the simple device of offering both products as a unit at a single price, while claiming that one of the two is a "free giveaway."

The amended complaint alleges that the FBP defendants exercised the requisite economic power in the market for the tying product to impose an appreciable restraint on free competition in the market for the tied product. *Northern Pacific Railway Co. v. United States, supra* at 11. Appellants introduced evidence purporting to demonstrate that the Compact vacuum cleaner—the tied product—was sold at a price substantially in excess of the price for similar vacuum cleaners and that the alleged tying product—the FBP buying service—was unique and lacked comparable substitutes, therefore tending to indicate market strength. *See, Fortner v. United States Steel Corp., supra* at 505. These allegations and the evidence submitted by plaintiffs together with the defendants' corresponding denials raise material factual questions which cannot be properly disposed of on a motion for summary judgment. *Poller v. Columbia Broadcasting System, Inc.*, 368 U. S. 464 (1962); *Jaroslawicf v. Seedman*, 528 F. 2d 727, 731-32 (2d Cir. 1975); *American Manufacturers Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 388 F. 2d 272 (2d Cir. 1967). It is fundamental that "[o]n summary judgment the inferences to be drawn from the underlying facts contained in such materials [affidavits, exhibits and depositions] must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U. S. 654, 655 (1962) (*per curiam*). We hold therefore that on the current state of the record summary judgment was inappropriate as the district court recognized in its original order of January 21, 1975 denying the defendants' motion. *See Cali v. Eastern Airlines, Inc.*, 442 F. 2d 65, 71-2 (2d Cir. 1971).

We note, however, that we do not accept plaintiffs' apparent argument that fraudulent or exaggerated statements by the Compact salesmen concerning the value of the FBP membership plan by themselves can create the "uniqueness" or "desirability" that might arise from actual economic power in the tying product market. *See Fortner v. United States Steel Corp., supra* at 505. In order to prevail on a *per se* theory of liability plaintiffs at trial must demonstrate that actual economic power was exerted by defendants in the relevant buying plan market since "where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most." *Northern Pacific Railway Co. v. United States, supra* at 6. If it develops that competing buying services of comparable value to the FBP plan were readily available to plaintiffs or that the true value of the FBP plan in relation to that of the vacuum cleaner is such as to make it implausible that any consumer would buy the tied product in order to obtain the "free" membership certificate no antitrust violation exists. These are issues that can only be resolved by a fuller fact-finding process than has taken place to date.

II.

The district court held that its grant of summary judgment dismissing plaintiff's claim of illegal tie-in was compelled by this Court's decision in *Capital Temporaries, Inc. of Hartford v. Olsten Corp.*, 506 F. 2d 658 (2d Cir. 1974) because plaintiffs had failed to make any assertions which if proved would establish "actual coercion" on behalf of the defendants in the sale of the tied products. We disagree.

In *Capital Temporaries* plaintiff-franchisee of defendant-franchisor's temporray personnel service alleged that in order to obtain an exclusive license from defendant to operate an office-personnel franchise (the tying product), he was required also to agree to establish and operate a non-office personnel or "blue collar" franchise (the tied product) against his wishes. Plaintiff argued that since the tying service franchised to him was trademarked the defendant's requisite economic power over the tying product market under the *Northern Pacific-Fortner* standards had to be presumed. The Court rejected this proposition holding that "a trademark *qua* trademark is not a sufficient indication of dominance over the tying product to qualify for per se treatment under the *Northern Pacific* rubric." 506 F. 2d at 663. In the instant case appellants have raised a genuine factual issue of the defendants' economic power in the market for buying services through introduction of affidavits and a market study which purport to demonstrate the FBP plan's unique nature and the lack of comparable competing services in the New York metropolitan region. Furthermore, unlike the situation in *Capital Temporaries* where plaintiff offered no evidence to suggest that he was only interested in obtaining the office personnel franchise or that he objected to taking the "blue collar" franchise at the time the license arrangements were made, 506 F. 2d at 666, several appellants in the instant case introduced affidavits stating that they were already the owners of satisfactory vacuum cleaners before entering into contracts with the Compact defendants and were forced to purchase new Compact cleaners in order to obtain the desired membership in the FBP buying service. Moreover, while the *Capital Temporaries*' "plaintiff ha[d] not even established any tie-in" 506 F. 2d at 664, here defendants admit to a policy of never offering the FBP

buying plan membership separately from the sale of the Compact cleaner. An unremitting policy of tie-in, if accompanied by sufficient market power in the tying product to appreciably restrain competition in the market for the tied product constitutes the requisite coercion under *Capital Temporaries,* given foreclosure of a not insubstantial volume of interstate commerce. *See, e.g., Fortner v. United States Steel Corp., supra; Northern Pacific Railway Co. v. United States, supra.*

III.

The district court properly dismissed plaintiffs' second cause of action which claimed that defendants, through the use of fraudulent misrepresentations concerning the Compact vacuum cleaner and FBP buying service, intended to and did restrain interstate trade in those items in violation of Section 1 of the Sherman Act since defendants knew that others would be unable to compete with them insofar as fraudulent sales practices are unlawful under applicable state and federal statute. It is clear that the foregoing fails to state a claim cognizable under the federal antitrust statutes and plaintiffs apparently do not press this argument on appeal. *See, Hunt v. Crumboch,* 325 U. S. 821, 826 (1945) ("[The Sherman Act] does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce."); *Apex Hosiery Co. v. Leader,* 310 U. S. 469, 512-13 (1940); *Norville v. Globe Oil & Refining Co.,* 303 F. 2d 281 (7th Cir. 1962).

GURFEIN, *Circuit Judge* (concurring):

I do not believe that this is really a tie-in antitrust case. Since it is on an appeal from the granting of a summary

judgment, however, I concur with some reluctance since there may conceivably be some state of facts, although I do not see it clearly, under which this could spell out a claim for relief. As it looks now, this case is no different from the giving of premiums like a set of dishes to persons who patronize a motion picture theatre.

As a matter of fact, the plaintiffs do not claim that the tying service actually gave a benefit to the purchaser of the vacuum cleaner but rather that it was part of a fraudulent scheme. We should be reluctant to permit fraud cases, without proper diversity of citizenship, to become antitrust cases so as to found nebulous antitrust claim for relief.